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No. .....

In The

# Supreme Court of the United States

October Term 1985

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

*Petitioner,*

v.

AMALGAMATED TRANSIT UNION, AFL-CIO, et al.,

*Respondents.*

## PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

The United States Court of Appeals for the District of Columbia Circuit has ruled that the Secretary of Labor must revoke his certification of Petitioner's labor protective arrangements under section 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. App. § 1609(c) (1982). The ruling will preclude Petitioner from receiving federal financial assistance for the construction and operation of its public transit system. To date, Petitioner has received slightly more than one billion dollars in such federal assistance. The Court of Appeals also denied Petitioner's Motion for Leave to Intervene in the proceedings in order to file a Petition for Writ of Certiorari in this Court. The questions presented are:

(1) Whether a transit system may intervene of right in proceedings where the certification of its labor protective arrangements under section 13(c) is being challenged and where revocation of the certification will terminate the system's federal financial assistance.

(2) Whether section 13(c) requires the application of federal labor law concepts to local transit labor relations in the place of state labor law.

(3) Whether the content of section 13(c) labor protective arrangements must be derived from a particularized set of provisions based on the National Labor Relations Act.

(4) Whether important considerations of federalism embodied in the Urban Mass Transportation Act require that a state be entitled to apply its own labor law to a local transit system's labor relations.

(5) Whether the Secretary of Labor may exercise discretion to accommodate the state and federal interests under section 13(c).

## LIST OF PARTIES

The following were parties to the proceeding in the United States District Court for the District of Columbia Circuit: Amalgamated Transit Union, AFL-CIO, Plaintiff-Appellant and Raymond J. Donovan, Secretary of Labor, Defendant-Appellee. The American Public Transit Association participated as *amicus curiae*.

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## PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, Metropolitan Atlanta Rapid Transit Authority ("MARTA"), respectfully prays for leave to intervene to file a Petition for Writ of Certiorari. MARTA further prays that a Writ of Certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in *Amalgamated Transit Union, AFL-CIO v. Raymond J. Donovan, Secretary of Labor* on July 23, 1985.

## OPINIONS BELOW

The opinion of the United States District Court, District of Columbia, reported at 582 F.Supp. 522 (D.D.C. 1984), is reprinted at Appendix E hereto, p. App. 51, *infra*, The opinion of the United States Court of Appeals for the District of Columbia Circuit, reported at 767 F.2d 939 (D.C. Cir. 1985), is reprinted at Appendix A, p. App. 1, *infra*. The opinion of the United States Court of Appeals for the District of Columbia Circuit, denying Petitioner's Motion for Leave to Intervene, reported at 771 F.2d 1551 (D.C. Cir. 1985), is printed at Appendix C, p. App. 44, *infra*.

## JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit in *Amalgamated Transit Union, AFL-CIO v. Raymond J. Donovan, Secretary of Labor*, was entered on July 9, 1985. Petitioner filed a Motion for Leave to Intervene and Petition For Rehearing And Suggestion For Rehearing En Banc on August 23, 1985. The Motion for Leave to Intervene was denied on September 11, 1985. The Court did not rule upon Petitioner's Petition For Rehearing And Suggestion For Rehearing En Banc. The Secretary of Labor, the original Defendant-Appellee below, also filed a Petition For Rehearing And Suggestion For Rehearing En Banc which was denied on September 6, 1985. (Orders attached hereto at Appendix F, p. App. 71, *infra*, and Appendix G, p. App. 72, *infra*.) This Petition for Leave to Intervene and Petition for Writ of Certiorari is filed within ninety (90) days of the Court of Appeals' denial of Petitioner's Motion for Leave to Intervene and the Secretary's Peti-

tion For Rehearing And Suggestion For Rehearing En Banc. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

This case involves section 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. App. § 1609(c) (1982). This statute is reprinted at Appendix H, p. App. 73, *infra*. Also involved is Rule 24(a) of the Federal Rules of Civil Procedure, reprinted at Appendix I, p. App. 74, *infra*.

## STATEMENT OF THE CASE

This litigation arises out of the Secretary of Labor's certification of Petitioner's labor protective arrangements pursuant to section 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. App. § 1609(c) (1982). Petitioner is a local public transit authority which operates in the Atlanta, Georgia area and which receives substantial federal financial assistance by virtue of the Act. Under section 13(c), the Secretary of Labor's certification of the local labor protective arrangement is a prerequisite to Petitioner's eligibility for such funding. The Amalgamated Transit Union International and its Local 732 brought this action against the Secretary of Labor in the United States District Court, District of Columbia, seeking a declaratory judgment that a 1982 Amendment to Petitioner's enabling legislation made it impossible for

Petitioner to comply with the requirements of section 13(c) and that the Secretary should be enjoined from certifying Petitioner's compliance with section 13(c). The District Court's jurisdiction was based upon 28 U.S.C. § 1331.

In upholding the Secretary's decision to certify Petitioner, the District Court held that section 13(c) allows the Secretary to exercise broad discretion in determining whether a labor protective arrangement, taken as a whole, is fair and equitable. *Amalgamated Transit Union v. Donovan,* 582 F.Supp. 522, 529 (D.D.C. 1984). On July 9, 1985, a three-member panel of the United States Court of Appeals for the District of Columbia Circuit ruled that the Secretary's certification of Petitioner's labor protective arrangement was improper and remanded the case to the District Court to revoke the Secretary's certification. *Amalgamated Transit Union International, et al. v. Raymond J. Donovan, Secretary of Labor,* 767 F.2d 939 (D.C. Cir. 1985). The effects of the Court of Appeals' ruling will be to preclude Petitioner from receiving any federal funding for its transit program and will seriously jeopardize the construction and operation of Atlanta's public transit system.

The Secretary of Labor filed a timely Petition For Rehearing And Suggestion For Rehearing En Banc on August 23, 1985. On September 6, 1985, the Court of Appeals denied the Petition. The Petitioner filed a Motion for Leave to Intervene on August 23, 1985. The Motion was denied on September 11, 1985. The Petitioner also filed a Petition For Rehearing And Suggestion For Rehearing En Banc in the Court of Appeals on August 23,

1985, but no ruling was entered on these matters. The Secretary of Labor filed a Petition For Stay of the Court of Appeals' mandate which was granted up to and including October 15, 1985.

## REASONS FOR GRANTING INTERVENTION

The question whether a transit system whose labor protective arrangements under section 13(c) may intervene of right in a proceeding where the arrangement is being challenged is of paramount importance. Now that a federal court has decided that a union which is dissatisfied with the terms of a 13(c) arrangement may bring an action against the Secretary of Labor over the certification of the arrangement, additional suits concerning the labor relations of other transit systems are likely to be forthcoming. This Court in *Jackson Transit Authority v. Local Division 1285*, 457 U.S. 15 (1982), held that a union may not bring an action against a transit system to enforce the provisions of a section 13(c) arrangement in federal court. *Id.* at 29. Restricted by this precedent, ATU sued the Secretary of Labor in federal court instead of Petitioner. An action against the Secretary achieves for the union the same goal it was denied in *Jackson*. It creates an entirely new avenue of relief and enables the union to seek judicial imposition of new and different terms into the 13(c) arrangement. Since a union may sue the Secretary of Labor directly and not name the transit system, the problem of allowing the transit system to intervene will be a recurring one.

Moreover, the question is crucial in that it implicates the administration of a federal statute. Whether a transit system may intervene in proceedings regarding the certification of its own labor protective arrangements raises questions of public importance in the interpretation and application of the Urban Mass Transportation Act, 49 U.S.C. App. § 1601, et seq. (1982) ("UMTA"). Over one billion dollars in federal funds are distributed each year under UMTA. 49 U.S.C. App. § 1617(a)(1)(B). The funds are in turn used to support the operation of public transit systems. The interpretation of section 13(c) is an integral part of the implementation of this federal assistance program. Thus the right of a transit system to intervene in section 13(c) litigation necessarily implicates public policy in the administration of the statute, as well as in the more fundamental issues of the public benefits to be derived from the grant of federal funds. Since this question is likely to be a recurring one and since it involves important questions regarding the administration of the Urban Mass Transportation Act, Petitioner requests that the Court consider and grant its Petition for Leave to Intervene and Petition for Writ of Certiorari.

A party's right to intervene in proceedings in a federal court is governed by Rule 24(a) of the Federal Rules of Civil Procedure. That rule first requires that an intervenor of right claim an interest relating to the property or transaction which is the subject of the action, and that the intervenor be so situated that as a practical matter disposition of the action may impair or impede his ability to protect that interest. Fed.R.Civ.P. 24(a)(2); *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.9 (1972).

These conditions have been met in the instant case since Petitioner is actually the real party in interest. Petitioner's interest, the certification of its labor protective arrangements under section 13(c), has always been the underlying basis of this proceeding. It is Petitioner's labor protective arrangement that will be decertified as a result of the Court of Appeals' opinion. The practical effect of the issuance of the Court of Appeals' mandate is that Petitioner will be unable to receive federal funding for its transit program.[1]

In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), a government civil antitrust suit, one of the customers of the defendant-company sought to intervene in the proceedings, but the District Court denied intervention. In reviewing the denial on appeal, this Court noted that protection of the intervenor's interests in a competitive system was at the heart of the proceedings. *Id.* at 135. The Court went on to remand the case with directions to allow intervention as of right. *Id.* at 136. Petitioner respectfully submits that its interest in the certification of its 13(c) arrangement and subsequent receipt of federal funds is even more immediate and concrete than an interest in a competitive system.

Other federal courts have similarly reasoned that a party's interest in the proceeding is obvious when it asserts a claim to property which is the subject matter of the suit. *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C.

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[1] It is important to note that the bar to federal funding arises not from Petitioner's conduct but from the command of conflicting state law.

Cir. 1981). Cf. *Arizona v. California*, 460 U.S. 605 (1983) (Indian tribes allowed to intervene in original action regarding determination of water boundaries of Colorado River where proceeding involved "an adjudication of their vital water rights"); *International Union, Local 283 v. Scofield*, 382 U.S. 205 (1965) (both successful charged party and charging party have a right to intervene in Court of Appeals proceedings which reviews or enforces Labor Board orders). Clearly, the subject matter of this suit is Petitioner's 13(c) arrangement and the federal funds which flow from a successful certification. Indeed, there would be no controversy but for the existence of Petitioner's labor protective arrangement. Under such circumstances, Petitioner's interests are at the heart of these proceedings.

Intervention of right also requires that the requesting party not be adequately represented by the existing parties to the litigation. Fed.R.Civ.P. 24(a)(2). "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich*, 404 U.S. at 538 n.10. Petitioner easily meets this slight burden. The Secretary of Labor is concerned with maintaining his authority and discretion over 13(c) matters in general. He has no direct interest in whether or not Petitioner continues to receive federal funds. On the other hand, Petitioner's interest is narrower and more focused and relates to the very essence of this proceeding, i.e., whether Petitioner's labor protective arrangements will be certified under section 13(c), which will in turn enable Petitioner to receive federal funds for the operation of its transit system. The Secretary's in-

terest in the flow of federal funds is only collateral, whereas Petitioner's interest is immediate and compelling.

Also at issue in the *Trbovich* case was the adequacy of the Secretary of Labor's representation of the proposed intervenor. The Court relied upon the distinct interests which the Secretary was obligated to serve in that litigation in finding that there was sufficient doubt about the adequacy of representation to warrant intervention. 404 U.S. at 538-39. The Court reasoned that although both the interest of the Secretary and the interest of the party whom he represented were important, ". . . they may not always dictate precisely the same approach to the conduct of the litigation." *Id.* at 539. Similarly, the divergent interests of the Secretary of Labor and Petitioner in this case warrant the granting of intervention.

The final requirement of Rule 24(a) is that the motion to intervene must be timely made. This must be determined from all the circumstances, including the purpose for which intervention is sought and the improbability of prejudice to those already in the case. *Foster*, 655 F.2d at 1324. Assessed under those criteria, it is clear that Petitioner's Motion is timely. This suit was brought far from Petitioner's home in a court lacking jurisdiction over Petitioner. Petitioner's interests were originally represented by the American Public Transit Association ("APTA") as *amicus curiae*. APTA is a national trade association of transit companies and Petitioner is a full member thereof. Petitioner's officers executed affidavits and made other factual showings in connection with the cross-motions for summary judgment in the trial court. APTA also represented Petitioner's

interests on appeal. Petitioner timely filed an original Motion for Leave to Intervene upon the adverse ruling by the Court of Appeals.

Petitioner seeks to intervene at this stage in order to file a Petition for Writ of Certiorari on the underlying merits of the case. This Court has previously permitted intervention for that precise purpose.

In *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1969), Mrs. Banks received an award pursuant to a claim filed under the Longshoremen and Harbor Workers Compensation Act. Subsequent to the award, the insurance company instituted an action in the United States District Court against the Deputy Commissioner of Labor, without naming Mrs. Banks as a party. After losing in the District Court, the insurance company appealed and obtained a reversal from the Court of Appeals. Mrs. Banks did not intervene either in the District Court or the Court of Appeals. The government, through the Solicitor General, declined to file a petition for writ of certiorari on the ground that no substantial federal question was involved, leaving Mrs. Banks without a party to appeal the decision adverse to her interests. This Court nevertheless allowed Mrs. Banks to intervene and granted the writ of certiorari, 389 U.S. 813 (1967), and decided the case on the merits, 390 U.S. 459 (1968).

Petitioner, like Mrs. Banks, did not seek intervention in the District Court, but it did seek to intervene at the Court of Appeals level. The Solicitor General has notified counsel for Petitioner that he will not seek review of the Court of Appeals' decision on behalf of the Secretary of Labor. Thus, Petitioner is in a position similar to that of

Mrs. Banks. Yet Petitioner's position is more compelling than that of Mrs. Banks. In *Banks*, the insurance company would be affected by a decision to the same extent as Mrs. Banks—one or the other of them would lose the amount of the claim. In comparison, the practical effect of the Court of Appeals' decision here has the most direct and immediate impact on the absent party and not the named parties. It is Petitioner's 13(c) arrangement that will be decertified and it is Petitioner who will lose federal financial assistance as a result—not the Union or the Secretary. Since Petitioner has a vital interest in the eventual resolution of this controversy, imperative reasons exist justifying intervention at this stage. *See also Hunter v. Ohio,* 396 U.S. 879 (1969) (non-party in state court proceedings allowed to intervene in Supreme Court for purpose of filing petition for certiorari, which was thereupon denied).[2]

This Court also permitted intervention after judgment (although at the trial of), in *Missouri-Kansas Pipe Line Co. v. United States,* 312 U.S. 502 (1941). In reversing the District Court's denial of intervention, the Court stated:

> Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the nisi prius court. But where

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[2] Cf. *Eastern-Central Motor Carriers Ass'n v. United States,* 321 U.S. 194, 199 n.5 (1944) and *N.L.R.B. v. Acme Industrial Co.,* 384 U.S. 925 (1966), where intervention in cases already pending before this Court was allowed to persons who had not been parties to the proceedings below but who had a vital interest in the eventual resolution of the cases.

> the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.

*Id.* at 506. Similarly, at issue in this case is the interpretation and enforcement of a public law, the Urban Mass Transportation Act. *See supra*, p. 6. Intimately connected to the administration of UMTA is the safeguarding of Petitioner's own interests. Petitioner's interests, however, are public and not private. Petitioner is a public body corporate which exists solely to serve the public by providing transportation services in a major metropolitan area. 1965 Ga. Laws, p. 2443. Moreover, the interests of every other transit system which receives funding pursuant to UMTA are at stake. Thus, under the reasoning of the *Missouri-Kansas* case, intervention, albeit after judgment, is required since the enforcement of a public law, as well as the interest of the public, is at stake.

Petitioner's request to intervene in order to file a Petition for Writ of Certiorari will cause no prejudice to the Amalgamated Transit Union, the original Plaintiff below, since Petitioner's interests have consistently been the primary focus of the litigation. As previously noted, even though the Plaintiff declined to name Petitioner as a party to the original action which was brought in a court lacking jurisdiction over Petitioner,[3] Petitioner's position and interests and those of other transit properties which may be similarly situated have been reflected in the exten-

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[3] The union could have brought suit in the Northern District of Georgia, where both Petitioner and the Secretary are subject to jurisdiction.

sive briefs filed both in the Court of Appeals and the District Court by APTA as *amicus curiae*. Since the Secretary will not proceed further, Petitioner's grounds for obtaining intervenor status are even more compelling because no party remains to represent its interests. *See, e.g., Smuck v. Hobson*, 408 F.2d 175, 181-82 (D.C. Cir. 1969) (*en banc*). Under these circumstances, Petitioner's request is timely.

In denying Petitioner's request for intervention below, the Court of Appeals stated that Petitioner could bring an action in the future against the Secretary for wrongfully decertifying Petitioner's labor protective arrangements. Such an approach is clearly undesirable. In examining joinder of parties under Rule 19(b) of the Federal Rules of Civil Procedure, this Court noted that "there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968). The Court recognized that there is a ". . . public stake in settling disputes by wholes, whenever possible . . . ." *Id.* Allowing Petitioner to intervene and argue its case now will prevent needless waste and further the goals of effective and efficient judicial administration. *See Mullaney v. Anderson*, 342 U.S. 415, 417 (1952).

In conclusion, Petitioner respectfully submits that it is entitled to be heard concerning a judgment that will severely prejudice its rights. *United States v. Terminal Railroad Ass'n*, 236 U.S. 194, 199 (1915). Compelling reas-

ons exist for permitting Petitioner to intervene at this level. The injury to Petitioner if the Court of Appeals' ruling stands is imminent and onerous. *Sutphen Estates, Inc. v. United States*, 342 U.S. 19, 22 (1951). Petitioner's interests, the certification of its 13(c) arrangement and the corresponding receipt of federal aid, are at the heart of this controversy. Further, Petitioner's rights may not be adequately represented by the existing parties. The Court has in the past for such reasons permitted intervention in order to present a petition for writ of certiorari. Accordingly, Petitioner respectfully requests that the Court grant it intervenor status and consider its Petition for Writ of Certiorari.

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## REASONS FOR GRANTING THE WRIT

### 1. The Decision Below Conflicts In Principle With The Decision Of This Court In Jackson Transit Authority v. Local Division 1285, Regarding The Proper Application Of Section 13(c) Of The Urban Mass Transportation Act.

The Court of Appeals' decision in this case clearly contradicts and undermines the principles enunciated by the United States Supreme Court in *Jackson Transit Authority v. Local Division 1285*, 457 U.S. 15 (1982) (hereinafter "*Jackson*"). *See also Local Division 732, Amalgamated Transit Union v. MARTA*, 667 F.2d 1327, 1332, 1340 (11th Cir. 1982). In *Jackson*, this Court expressly stated that "[s]ection 13(c) evinces no congressional intent to upset the decision in the National Labor Relations Act to permit state law to govern the relationship between local

governmental entities and the unions representing their employees." 457 U.S. at 23-24. Examining the legislative history, the Court declared that "[a] consistent theme runs throughout the consideration of [section] 13(c): Congress intended that labor relations between transit workers and local governments would be controlled by state law." *Id.* at 24. Finally, the *Jackson* opinion makes it clear that the paramount role of state law is in fact the basis of the decision itself:

> Thus, Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers. Section 13(c) would not supersede state law, it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations. Congress intended that Section 13(c) would be an important tool to protect the collective-bargaining rights of transit workers, by ensuring that state law preserved their rights before federal aid could be used to convert private companies into public entities. See 109 Cong. Rec. 5673 (1963) (remarks of Sen. Morse) (if city proposed to reject collective bargaining, it would be ineligible for federal aid). But Congress designed Section 13(c) as a means to accommodate state law to collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law.

457 U.S. at 27-28.

The Court of Appeals completely ignored these principles and found that in enacting 13(c), it was ". . . Congress' clear intent to measure state labor laws against the standards of collective bargaining established by federal labor policy." *Amalgamated Transit Union International,*

*et al. v. Raymond J. Donovan, Secretary of Labor*, 767 F.2d 939, 948 (D.C. Cir. 1985). The Court of Appeals' opinion, in [illegible]ete contradiction to this Court's guidelines in *Ja[illegible]*, continued to expand on the theme of federal labor policy, stating:

> On the other hand, Congress made it clear that federal labor policy would dictate the substantive meaning of collective bargaining for purposes of section 13(c). "Good faith" bargaining, to a point of impasse if necessary, over wages, hours and other terms and conditions of employment has always been the essence of federally-defined collective bargaining rights; indeed, excluding the federal sector, it is the almost universally recognized definition of collective bargaining in the United States.

*Id.* at 950-51. Good faith bargaining to impasse over wages, hours and working conditions is, of course, the definition of collective bargaining prescribed by the National Labor Relations Act, 29 U.S.C. § 158(d) ("NLRA"), but that Act does not apply to the state or local government. Yet, in order to give content to the phrase "wages, hours and working conditions," the Court of Appeals relied on cases decided by ten federal courts and three decisions of the National Labor Relations Board, all applying the National Labor Relations Act. *See* 767 F.2d at 952-53 nn.12, 13, 16 and 19. Despite this Court's express recognition in *Jackson* of the exclusion of local government employers from the NLRA, the Court of Appeals imposed on a local public transit agency, as a condition to federal funding, the precise requirements of the National Labor Relations Act, and the entire body of judicial and administrative interpretation which has been developed under that statute.

In sum, the Court of Appeals' decision judged a body of local transit labor relations law solely for its conformity with the National Labor Relations Act despite this Court's express holding that section 13(c) was not designed as a means to substitute a federal law of collective bargaining for state labor law. 457 U.S. at 28. Thus, the principles enunciated by this Court regarding the relationship between state and federal labor law, as it relates to the receipt of federal funding, have been completely subverted by the Court of Appeals. This conflict justifies the grant of certiorari to review the judgment below.

**2. The Decision Below Raises Significant And Recurring Problems Concerning The Interpretation And Application Of The Urban Mass Transportation Act.**

The Court of Appeals' decision does more than conflict with this Court's pronouncements in *Jackson*. The practical effect of the conflict is that the Court of Appeals' ruling presents significant questions regarding the interpretation and application of section 13(c) of the Urban Mass Transportation Act ("UMTA"). The opinion below affects the construction of UMTA in two important ways.

First, the Court of Appeals requires that the content of section 13(c) labor protective arrangements be derived from the National Labor Relations Act. This approach, of course, leaves no room for the accommodation of state labor law and policy which this Court, in *Jackson*, found was Congress' express intent. This Court concluded that great deference should be given to state law in examining the adequacy of labor protective arrangements under sec-

tion 13(c). *Jackson,* 457 U.S. at 24, 27-28. And, this Court expressly rejected the idea that Congress intended "to upset the decision in the National Labor Relations Act to permit state law to govern the relationships between local governmental entities and the unions representing their employees." *Id.* at 23-24.

Interestingly, the Court of Appeals recognized the federalism concerns that are embodied in section 13(c):

> In sum, Congress struck a delicate balance in section 13(c). The statute provides that state law should govern the labor relations of public transit authorities and their employees, but it conditions federal transit aid, in part, on the continuation of collective bargaining rights.

767 F.2d at 950.

The Court erred, however, when it derived the content of 13(c) requirements from federal, rather than state law. In so doing, the Court of Appeals effectively abolished the "delicate balance" to which it referred, and instead struck its own balance in favor of the federal collective bargaining model. By prescribing a detailed set of standards derived from the National Labor Relations Act, the Court of Appeals completely undermined the guidelines set forth in *Jackson* regarding the proper interpretation and application of section 13(c). In light of this Court's holding that section 13(c) should be interpreted as a means to accommodate state law to collective bargaining, 457 U.S. at 28, the Court of Appeals' decision that the content of section 13(c) arrangements should be derived from federal, rather than state law, raises significant problems concerning the construction of that statute.

Second, the Court of Appeals upset the enforcement scheme of the statute established by Congress. Section 13(c) expressly provides that whether a labor protective arrangement is fair and equitable is to be determined by the Secretary of Labor. 49 U.S.C. § 1609(c). Congress established this statutory standard that calls for very broad Secretarial discretion in order to permit the accommodation of the federal interests with state law. The legislative history of section 13(c) demonstrates that Congress gave "strong, flexible and discretionary power" to the Secretary to approve labor protections. *Local Division 589, ATU v. Massachusetts,* 666 F.2d 618, 629 (1st Cir. 1981), *cert. denied,* 457 U.S. 1117 (1982). Thus, Congress intended that the Secretary of Labor be responsible for striking the proper balance between the federal interest and state transit labor law. The Court of Appeals, however, usurped the Secretary's role in judging labor arrangements, in spite of Congress' decision to distribute the enforcing authority to the Secretary of Labor. To the contrary, the Court of Appeals assigned to itself the role of applying the language of section 13(c) to a particular fact situation. In so delegating that power to itself, the Court of Appeals flatly defied the express intent of Congress, as provided in the statute, that the Secretary of Labor should determine whether labor protective arrangements are fair and equitable.

Thus, two significant questions regarding the construction of section 13(c) are presented. First, should the Court of Appeals require that the content of section 13(c) arrangements be derived from the NLRA or should state labor law be accommodated? Second, should the Court of Appeals assume the role of the Secretary of Labor in

determining whether under a specific set of facts, an arrangement complies with section 13(c)? As discussed, *supra* p. 5, these questions will undoubtedly be recurring. The Union has successfully challenged the certification of a 13(c) arrangement in a forum distant from the geographic location of the transit system and can, therefore, be expected to litigate in the same manner other arrangements with which it is unsatisfied. Since the decision below raises significant and likely recurring issues concerning the interpretation and application of section 13(c) of the Urban Mass Transportation Act, Petitioner respectfully submits that certiorari to review the judgment of the Court of Appeals should be granted.

### 3. The Decision Below Conflicts In Principle With The First Circuit's Interpretation Of Section 13(c).

The First Circuit in *Local Division 589, ATU v. Massachusetts*, 666 F.2d 618 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982), held that in cases of conflict, state law must prevail over section 13(c) assurances. *Id.* at 627. Although the District of Columbia Circuit in this action dealt with another facet of section 13(c), the certification procedure, the underlying inquiry of both courts was the same: Did Congress intend that federal law should prevail over state labor transit law with respect to section 13(c) labor protective arrangements? The First Circuit decided unequivocably that in cases of conflict, state law would override more liberal section 13(c) assurances. The conflict in principle between the First Circuit and the District of Columbia Circuit is particularly crucial since the state statute which the First Circuit upheld is virtually

identical to the one that the District of Columbia Circuit found necessarily invalidated Petitioner's section 13(c) arrangement.

The most glaring inconsistency between the analyses of the District of Columbia Circuit and the First Circuit, that the same state statute could on the one hand prevail against a challenge based on federally defined labor rights and on the other hand lead to the invalidation of a section 13(c) arrangement, is apparent. The conflict between the two opinions, however, is more direct. Two principles in particular upon which each court relied are diametrically opposed.

First, the First Circuit reasoned that "Congress' general intent to secure fair arrangements does not require the implementation of any *particular* set of detailed provisions." (emphasis original) 666 F.2d at 634. On the other hand, the District of Columbia Circuit's opinion contains several pages detailing the particular provisions which fall within the "concept of collective bargaining" and, therefore, which must be embodied in section 13(c) labor protective arrangements. 767 F.2d at 951-52. The District of Columbia Circuit found that section 13(c) requires good faith bargaining to impasse over wages and fringe benefits. *Id* at 952. Moreover, according to the District of Columbia Circuit, the number of regular hours, the number of overtime hours, work assignments and promotions must be included as collective bargaining items in a section 13(c) arrangement. *Id.* at 952-53. The D.C. Circuit's detailed set of provisions stands in sharp contrast to the legislative history, as noted by the First Circuit, that "Congress was sensitive to the local nature of local transit; it 'expected that specific conditions [in

§ 13(c) assurances] normally will be the product of local bargaining and negotiations;' Senate Report, *supra* note 25, at 28; *see* House Report, *supra* note 25, [1964] U.S. Code Cong. & Admin. News at 2584-2585; . . . ." 666 F.2d at 634.

Furthermore, the First Circuit, analyzing the legislative history of section 13(c), recognized that Congress gave "strong, flexible and discretionary power" to the Secretary to approve labor protections. 666 F.2d at 629. The Court summarized Secretary Wirtz's initial presentation of 13(c) to Congress as follows:

> [T]he Secretary emphasized the breadth of the discretionary power that Section 13(c) gave to the Labor Department and the "flexibility" with which that discretion must be exercised. Thus, he told the House Committee that the Labor Department had the need for "flexibility" in mind "when the standards in the proposal were drafted." The provisions provided flexibility both because the standard used — "fair and equitable arrangements" — was a highly general one and because the statute allowed the Secretary to take "account of the fact that different answers may be appropriate in different cases." Indeed, . . . the provision did not even require him to withhold funds from a state with a law prohibiting collective bargaining among municipal employees. Even in such a case he would search for ways to work out arrangements that would allow the state to participate in the program.

*Id.* at 628-29. The great breadth of discretion granted the Secretary in section 13(c) was appropriate, and indeed necessary, to achieve the express objective of Congress.

The D.C. Circuit, on the other hand, virtually stripped the Secretary of any discretion "to work out arrangements

that would allow the state to participate in the program." 666 F.2d at 629. By prescribing a detailed set of standards derived from the National Labor Relations Act, the D.C. Circuit usurped the role of the Secretary of Labor to strike the proper balance between the federal interests and state transit labor law. The refusal of the D.C. Circuit to respect the Secretary's exercise of discretion and the action of the Court in conducting a *de novo* review directly conflicts with the First Circuit's approach. These conflicts justify the grant of certiorari to review the judgment below.

## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

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## APPENDIX A

AMALGAMATED TRANSIT UNION
INTERNATIONAL, AFL-CIO, et al.,

Appellants,

v.

RAYMOND J. DONOVAN,
Secretary of Labor.

No. 84-5159.

United States Court of Appeals,
District of Columbia Circuit.

Argued April 11, 1985.

Decided July 9, 1985.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 82-02042).

Jeffrey R. Freund, Washington, D.C., with whom Linda R. Hirshman, Chicago, Ill., Earle W. Putnam and Laurence Gold, Washington, D.C., were on brief, for appellants.

Robert C. Seldon, Asst. U.S. Atty., Washington, D.C., with whom Joseph E. diGenova, U.S. Atty., Royce C. Lamberth and R. Craig Lawrence, Asst. U.S. Attys., John F. Depenbrock, Associate Sol., Department of Labor, and Trudy B. Levy, Asst. Chief Counsel, Dept. of Transportation, Washington, D.C., were on brief, for appellee.

William T. Coleman, Donald T. Bliss and Robert W. Batchelder, Washington, D.C., were on brief, for American Public Transit Ass'n, amicus curiae, urging affirmance.

Before EDWARDS and GINSBURG, Circuit Judges, and MacKINNON, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS.

Concurring statements filed by Circuit Judge GINSBURG and Senior Circuit Judge MacKINNON.

HARRY T. EDWARDS, Circuit Judge.

Section 13(c) of the Urban Mass Transportation Act of 1964 ("UMTA" or "the Act"), 49 U.S.C.App. § 1609(c)(1982), stipulates that, before federal funds may be awarded to a formerly private but presently publicly owned transit system, the Secretary of Labor must certify that the transit authority has made a "fair and equitable" labor protective arrangement that includes, among other things, provisions ensuring employees of "the continuation of collective bargaining rights."[1] In the present case,

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1. Section 13(c), 49 U.S.C. App. § 1609(c) (1982), reads in full: It shall be a condition of any assistance under section 1602 of this Appendix that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect

(Continued on following page)

the Secretary of Labor certified the labor protective agreement of Metropolitan Atlanta Rapid Transit Authority ("MARTA" or "the Authority"). MARTA's certification was granted even though, under controlling state law, the Authority is prevented from bargaining collectively with the appellant Amalgamated Transit Union ("ATU") over certain essential terms and conditions of employment and is arguably granted the power to unilaterally establish wages for employees represented by the Union. The ATU here challenges the Secretary's refusal to deny certification to MARTA.

The District Court upheld the Secretary's decision, ruling that section 13(c) does not limit the Secretary to

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(Continued from previous page)

the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 11347 of title 49. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

certifying only those labor agreements that contain certain specific labor protective provisions, but rather confers upon him broad discretion to determine whether an agreement, taken as a whole, is fair and equitable. *Amalgamated Transit Union v. Donovan*, 582 F.Supp. 522, 529 (D.D.C. 1984). Because we read the plain language of the Act and its legislative history as mandating, rather than simply recommending, the continuation of collective bargaining rights, and because, by virtue of the current Georgia law, MARTA's labor agreement with ATU does not provide for the continuation of such rights, we reverse the judgment below, with instructions that the District Court require the Secretary to revoke his certification.

## I. BACKGROUND

Prior to 1971, mass transportation in the Atlanta metropolitan area was provided by Atlanta Transit System ("ATS"). As a private company, ATS was covered by the National Labor Relations Act ("NLRA"), and its workers enjoyed the rights protected by that statute. Appellant ATU represented ATS employees and negotiated a series of collective bargaining agreements with the company setting wages, hours and other terms and conditions of employment. These negotiations were subject to section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1982), which prescribes mandatory subjects of bargaining, and ATS employees were legally entitled to strike to gain leverage in collective bargaining with ATS. Affidavit of Earle W. Putnam, General Counsel, ATU, *reprinted in* J.A. 84.

In 1965, the Georgia legislature created MARTA, a public corporation authorized to purchase and operate the mass transit system run by ATS. Although Georgia law at the time did not permit public employers to bargain collectively, *see International Longshoremen's Association v. Georgia Ports Authority*, 217 Ga. 712, 718, 124 S.E.2d 733, 737, *cert. denied*, 370 U.S. 922, 82 S.Ct. 1561, 8 L.Ed. 2d 503 (1962), MARTA's enabling statute allowed the Authority to recognize the transit workers' bargaining representatives and to bargain with them "in the same manner and to the same extent as if they were the employees of any privately owned transportation system." 1965 Ga.Laws at 2243, § 20(b). In 1971, MARTA applied to the Department of Transportation ("DOT") for a grant of UMTA funds in order to purchase and operate ATS. Sections 13(c), 3(e)(4)[2] and 5(n)(1)[3] of the Act condition a grant of funds on certification by the Secretary of Labor that the state or municipal transit authority has satisfied the labor standards set forth in section 13(c). As the Supreme Court explained in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982), UMTA was passed at a time when many private transit companies were in precarious financial condition, and the statute was designed to allow local governments to step in and purchase such companies so that communities would not be without transportation services. *Id.* at 17, 102 S.Ct. at 2204. At the same time, Congress recognized that many state laws forbade collective bargaining

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2. 49 U.S.C.App. § 1602(e)(4) (1982).

3. 49 U.S.C.App. § 1604(n)(1) (1982).

by public employers, and "was aware that public ownership might threaten existing collective-bargaining rights of unionized transit workers." *Id.* Accordingly, Congress included section 13(c) in UMTA "[t]o prevent federal funds from being used to destroy the collective-bargaining rights of organized workers." *Id.* Section 13(c) achieves this end by providing that

> a state or local government must make arrangements to preserve transit workers' existing collective-bargaining rights before that government may receive federal financial assistance for the acquisition of a privately owned transit company.

*Id.* at 16, 102 S.Ct. at 2203.

MARTA, of course, was excepted from Georgia's general prohibition against collective bargaining by state and local governments, and thus, in anticipation of its application for UMTA funds, the Authority met with ATU in 1971 and negotiated a labor protective, or "13(c)," agreement. In this 1971 agreement, MARTA recognized ATU's right to engage in collective bargaining over "all subjects of collective bargaining which are or may be proper subjects of collective bargaining with a private employer."[4] The parties also provided that there would be no strikes or lockouts in the event of impasse, but rather, that either party could request that bargaining disputes be submitted to binding, or "interest," arbitration.[5] Based on this 13(c) agreement, the Secretary of Labor certified that the

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4. Agreement Pursuant To Section 13(c) Of The Urban Mass Transportation Act of 1964 at 2, *reprinted in* J.A. 124.

5. *Id.* at 4-5, 7, *reprinted in* J.A. 126-27, 129.

parties had entered into a fair and equitable arrangement protecting the transit workers' rights, and that MARTA therefore qualified for UMTA funds. In 1972, following receipt of these funds, MARTA purchased the assets, property and facilities of ATS, and ATS employees became public employees of MARTA.

During the ten years following MARTA's acquisition of the transit system, the Authority applied for and received additional UMTA funds. In each case, the Secretary of Labor certified that the parties' 13(c) agreement, which was renewed in 1977, was fair and equitable. That agreement expired in 1981, however, before MARTA and ATU were able to negotiate a new agreement, and the parties submitted their bargaining disputes to interest arbitration. During the course of the arbitration proceedings, MARTA determined that, since the agreement had expired, it was no longer obligated to pay cost of living adjustments ("COLAs") and therefore ceased all such payments. ATU sought injunctive relief in federal court, arguing that MARTA's cessation of the COLA benefits was a breach of the 1977 13(c) agreement. The district court granted the injunction, but the Eleventh Circuit dismissed the suit on appeal, holding that breach of a 13(c) agreement was not a statutory violation giving rise to a federal cause of action, but was rather a simple breach of contract action over which state, not federal, courts had jurisdiction. *Local Division 732, Amalgamated Transit Union v. MARTA*, 667 F.2d 1327, 1332, 1340, (11th Cir. 1982). MARTA then revoked its consent to interest arbitration, which it claimed it had a right to do under Georgia law, and on February 23, 1982, it gained a temporary restraining order in state court against further

arbitration proceedings. *MARTA v. Local Division 732, Amalgamated Transit Union,* No. C-83621 (Super.Ct. Fulton County, Ga.), *aff'd,* 251 Ga. 15, 303 S.E.2d 1 (1983), *vacated and remanded,* — U.S. —, 104 S.Ct. 1263, 79 L.Ed. 2d 670 (1984), *on remand,* 253 Ga. 219, 320 S.E.2d 742 (1984).

Shortly thereafter, in April 1982, the Georgia legislature entered the fray by passing Act 1506, which amended the 1965 MARTA Act so as to limit MARTA's authority to bargain collectively with ATU. Specifically, Act 1506 prohibited MARTA from bargaining over five subjects that are at issue here: the assignment of employees, discharge and termination of employees for cause, subcontracting of work, fringe benefits for part-time employees, and assignment and calculation of overtime. It also changed the procedures to be followed for interest arbitration such that, where the parties could not agree on wages, the matter could be submitted to arbitration only upon the consent of *both* parties. Act 1506 § 3(b)(2), 1982 Ga.Laws at 5104.

At the time when Act 1506 was passed, MARTA had pending an application for additional UMTA funds. ATU had notified the Secretary in March, 1982, that it did not oppose certification based on the 1977 13(c) agreement, but following passage of Act 1506, MARTA objected to a certification premised on that agreement, since the new Georgia law prevented the employer from honoring the agreement's interest arbitration provisions. Both sides, of course, were anxious to avoid a loss of federal funding. and the parties therefore agreed to certification based on the 1977 13(c) agreement, with each side reserving the right to litigate in state or federal court the validity of

the agreement's interest arbitration provisions in light of Act 1506.[6] On the basis of this understanding, the Secretary certified MARTA on June 11, 1982, as eligible to receive UMTA funds. On that same day, the Supreme Court handed down its decision in *Jackson Transit Authority*, holding that 13(c) agreements are enforceable only in state courts under state law. 457 U.S. at 29, 102 S.Ct. at 2210. The Court's decision, which accorded with the Eleventh Circuit's disposition of ATU's suit against MARTA, meant that ATU could only seek enforcement of the 1977 agreement's arbitration provisions in state court, where, of course, Act 1506 would supersede the provisions of the parties' contract. Since the Supreme

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6. At the time of the parties' agreement, five circuits outside the Eleventh had held that breach of a 13(c) agreement constituted a violation of a federal statute. *Division 587, Amalgamated Transit Union v. Municipality of Metropolitan Seattle*, 663 F.2d 875 (9th Cir.1981); *Local Division 1285, Amalgamated Transit Union v. Jackson Transit Auth.*, 650 F.2d 1379 (6th Cir.1981), *rev'd*, 457 U.S. 15, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982); *Local Div. 714, Amalgamated Transit Union v. Greater Portland Transit Dist.*, 589 F.2d 1 (1st Cir.1978); *Local Div. 519, Amalgamated Transit Union v. LaCrosse Municipal Transit Util.*, 585 F.2d 1340 (7th Cir.1978); *Division 1287, Amalgamated Transit Union v. Kansas City Area Transportation Auth.*, 582 F.2d 444 (8th Cir.1978), *cert. denied*, 439 U.S. 1090, 99 S.Ct. 872, 59 L.Ed.2d 56 (1979). The Supreme Court granted certiorari in *Jackson Transit Authority*, 454 U.S. 1079, 102 S.Ct. 632, 70 L.Ed.2d 613 (1981), to consider the question. Rather than jeopardize MARTA's funding, ATU decided to agree to a certification based on the 1977 agreement, and to challenge the contrary arbitration provision of Act 1506 as inconsistent with federal law. A decision in *Jackson Transit Authority* upholding the enforceability of 13(c) agreements in federal court under federal law would have overturned the Eleventh Circuit's decision and would have permitted ATU to enforce the 1977 agreement notwithstanding Act 1506, while at the same time preserving MARTA's federal funding. The Court, however, held that 13(c) agreements are enforceable only in state court under state law. 457 U.S. at 29, 102 S.Ct. at 2210.

Court's decision effectively precluded enforcement of the 1977 agreement's impasse resolution mechanism, ATU requested on June 15, 1982, that the Secretary withdraw his certification, arguing that MARTA's transit workers no longer enjoyed the continuation of collective bargaining rights as required by section 13(c). The Department of Labor declined to do so, however, stating that it was "unaware of any facts or circumstances which would render the . . . 1977 agreement no longer fair and equitable." Letter of Ronald St. Cyr, Deputy Assistant Secretary of Labor, to John W. Rowland, International President, ATU (June 24, 1982), *reprinted in* J.A. 161.

ATU then filed this action, challenging the Secretary's decision not to reconsider the certification. The union contended that the Secretary had violated section 13(c) by certifying an agreement that did not provide for interest arbitration for wage disputes, and that did not permit collective bargaining on five subjects over which the union previously was entitled to bargain. The District Court granted summary judgment in favor of the Secretary. The trial court concluded that, notwithstanding the Secretary's objection, a section 13(c) certification decision is subject to judicial review, but that the court's inquiry is limited to determining whether that decision is arbitrary or capricious. Applying this standard, the District Court found that the Secretary had reasonably determined that the agreement at issue was fair and equitable, even though it did not contain certain provisions the union desired. In so ruling, the District Court rejected ATU's contention that a 13(c ) agreement cannot be certified unless it includes provisions satisfying each of the five specific requirements set out in the statute. 582 F.Supp. at 529-30. This appeal followed.

## II. ANALYSIS

### A. *Judicial Review*

[1] Before this court, the Secretary renews his claim that certification decisions are "agency action[s] . . . committed to agency discretion by law," and therefore fall within the class of agency decisions shielded from judicial review by the Administrative Procedure Act ("APA"). 5 U.S.C. § 701(a)(2) (1982). This contention, however, is premised on a flawed interpretation of section 13(c) and is inconsistent with settled principles of judicial review of administrative actions.

The Secretary argues that section 13(c) requires nothing more than that he find a given labor protective-agreement "fair and equitable," and that this congressional delegation of authority confers upon him such broad discretion that courts are simply without law to apply in reviewing his decisions. This argument proceeds from the notion that the statute's five enumerated subsections including subsection 2, which calls for "the continuation of collective bargaining rights," are merely "general objectives" to guide his determinations, and set forth no precise formulation for determining when labor protective agreements are fair and equitable. As the Secretary reads the statute, he is free to certify a labor protective agreement that satisfies only two or three of the five "general objectives," as long as he believes that the agreement, taken as a whole, is fair.

The plain language of the statute, however, belies such a reading. Section 13(c) states quite clearly that "[labor] protective arrangements *shall* include, without being limited to, such provisions as may be necessary for

. . . the continuation of collective bargaining rights." 49 App. U.S.C. § 1609(c) (1982) (emphasis supplied). We fail to see how this language can be read as anything other than mandatory; section 13(c) is drafted as a legislative command, not a delegation of unreviewable discretion.

Indeed, in *Jackson Transit Authority*, the Supreme Court read the statute as setting forth mandatory requirements, not simply general objectives or suggestions. The Court noted that section 13(c) "lists several protective steps that *must* be taken before a local government may receive federal aid; among these [is] the . . . continuation of collective-bargaining rights." 457 U.S. at 17-18, 102 S.Ct. at 2204 (emphasis supplied). The Court also stated that "[s]ection 13(c) demands 'fair and equitable arrangements' as prerequisites for federal aid; it requires the approval of the Secretary of Labor for those arrangements; *it specifies five different varieties of protective provisions that must be included among the 13(c) arrangements.*" *Id.* at 23, 102 S.Ct. at 2207 (emphasis supplied). The Court, therefore, has rejected the very interpretation of section 13(c) that the Secretary advances in support of his claim that certification decisions are unreviewable. The statute does not confer limitless discretion on the Secretary to divine what is fair and equitable in the abstract. Rather, it prescribes statutory minima that both circumscribe his discretion and dictate standards for determining the fairness and equity of particular labor protective arrangements.[7]

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7. The Secretary cites several cases that characterize certification decisions as unreviewable, but a careful reading reveals that the courts in those cases were presented with fundamentally different questions than that addressed here. For ex-

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ample, in *Kendler v. Wirtz*, 388 F.2d 381 (3d Cir.1968), the Secretary certified a labor protective agreement that gave reemployment priority to all covered workers who lost their jobs because of a transit project that re-routed some New Jersey Central trains over Pennsylvania Railroad tracks. Section 13(c)(4) calls for priority in the reemployment of covered workers, and the union argued that the labor agreement did not satisfy this requirement because it only gave displaced workers priority for vacancies within the Pennsylvania line, but not the New Jersey Central line. The Third Circuit upheld the Secretary's decision, however, and refused to review a "mere difference of judgment between a person disadvantageously affected by agency action and the responsible head of the agency." *Id.* at 383. The Third Circuit thus adopted a limited scope of review for situations in which the Secretary decides whether or not a specific provision within a labor agreement satsfies one of section 13(c)'s express objectives. *Kendler* says nothing, however, about the scope of review for a case such as this, where the Secretary has certified an agreement because he believes that on the whole it is fair and equitable, even though it does not satisfy an express requirement of section 13(c). Similarly, in *City of Macon v. Marshall*, 439 F.Supp. 1209 (M.D.Ga.1977), the court declined to review the Secretary's decision not to certify a plan in which the transit authority refused to bargain with or recognize the workers' union. Just as in *Kendler*, where the Secretary found that a certain provision satisfied one of the statute's five goals, so too he may decide that the absence of certain provisions fails to satisfy one of those goals and that certification is improper. In both cases, the Secretary measured the agreements against the statute's express requirements. Neither *Marshall* nor *Kendler*, however, speak to the present situation, where the Secretary has determined that an agreement that does not satisfy all of section 13(c)'s objectives is nevertheless fair and equitable. In essence, this case does not concern the exercise of recognized discretionary authority, but an agency's interpretation of the authority delegated to it. Such interpretations are always subject to judicial review. *See Chevron, U.S.A., Inc. v. Naural Resources Defense Council, Inc.*, — U.S. —, 104 S.Ct. 2778, 2782 n. 9, 81 L.Ed.2d 694 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."); *SEC v. Sloan*, 436 U.S. 103, 118, 98 S.Ct. 1702, 1711, 56 L.Ed.2d 148 (1978) ("'[C]ourts are the final authorities on issues of statutory construction.'") (quoting *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261, 272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090 (1967)).

In *Heckler v. Chaney*, — U.S. —, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), the Court interpreted the APA, 5 U.S.C. § 701(a)(2), as creating only a narrow exception to the general rule of judicial review of agency decisions, thereby reaffirming the strong presumption in favor of such review. In *Chaney*, plaintiffs sought review of the Food and Drug Administration's refusal to take various enforcement actions to prevent the use of unapproved lethal drugs for the execution of prisoners. The Court ruled that decisions not to prosecute or enforce are "generally committed to an agency's absolute discretion" and are therefore not subject to judicial review. *Id.* at 1656. The Court emphasized that the "exception to reviewability provided by § 701(a)(2) . . . remains a narrow one," *id.* at 1659, and contrasted refusals to enforce with decisions that involve "an affirmative act of approval under a statute that set[s] clear guidelines for determining when such approval should be given," and are therefore reviewable. *Id.* at 1655. The Court offered, as a prototypical example of reviewable agency action, the decision involved in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). In that case, the Secretary of Transportation approved construction of a highway project through parkland under a statute that permitted such construction only where the Secretary first determined that no feasible alternative existed. The Court found that the statute set out sufficiently clear standards to permit judicial review of agency decisions taken under it, despite the broad discretion that Congress had conferred on the Secretary. *Id.* at 411-13, 91 S.Ct. at 821-22.

A certification decision under section 13(c) of the UMTA clearly falls within the large category of agency decisions that, under *Chaney* and *Overton Park,* remain subject to judicial review. Certification constitutes an affirmative act of approval—unless and until the Secretary determines that a given 13(c) agreement is fair and equitable within the meaning of the statute, no UMTA funds may be disbursed. Moreover, certification decisions are made under a statute that sets out clear guidelines for determining when such approval is to be given. Indeed, section 13(c), with its five express requirements, sets out far more precise standards than the statute at issue in *Overton Park,* which simply prohibited the Secretary of Transportation from approving any project using parkland unless he determined that no "feasible" alternatives existed. 401 U.S. at 411, 91 S.Ct. at 821.

In short, the plain language of the statute, as well as the Supreme Court's decision in *Chaney,* demonstrate that the Secretary's claim of unreviewability is simply untenable. The District Court correctly ruled that certification decisions are subject to judicial review.

B. *The Continuation of Collective Bargaining Rights*

1. *Mandatory or permissive?*

[2] Having concluded that the Secretary's decisions may be reviewed by the courts, the District Court adopted an abuse of discretion standard for purposes of judging such decisions. The District Court believed that, under section 13(c), the Secretary is only required to "scrutinize [a labor] agreement *as a whole* to ensure that it is fair and reasonable." 582 F.Supp. at 529 (emphasis supplied).

We disagree. This reading of the statute is essentially the same as that advanced by the Secretary in support of his contention that certification decisions are completely unreviewable; it rests on the premise that the five enumerated subsections of 13(c) are simply statutory suggestions rather than legal standards that govern the Secretary's certification decisions. As we have already observed, section 13(c) is written in mandatory terms, and the Supreme Court has so interpreted it. The Secretary is not free to certify a labor agreement that does not provide for the continuation of collective bargaining rights simply because he believes that, on balance, the agreement is fair. Rather, he must first determine that the requirements of the statute are fully satisfied *before* he can find an agreement "fair and equitable."

This construction of the statute is compelled not only by its plain language, but by its legislative history as well. As originally drafted, section 13(c)(2)would have required only the *encouragement* of the continuation of collective bargaining rights. *See* H.R.Rep. No. 204, 88th Cong., 1st Sess. 20 (1963), *reprinted in* 1964 U.S. Code Cong. & Ad.News 2569, 2589. Secretary of Labor Wirtz, who presented the administration's version of section 13(c) to Congress, testified that the statute was drafted with the need for "flexibility" in mind, and that it would not require the Secretary to withhold certification even where a state's laws prohibited collective bargaining altogether. *Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency,* 88th Cong., 1st Sess. 482-83 (1963) ("*House Hearings*"). Congress, however, was not content to entrust the protection of collective bargaining rights to the

absolute discretion of the Secretary of Labor. The Senate dropped the "encouragement" language at the urging of Senator Morse, who insisted that "encouragement" was too vague a standard and afforded little, if any, protection to unionized workers. 109 Cong.Rec. 5675 (1963). Noting that the original bill " 'encourages' the maintenance of the status quo, but . . . does not require it," *id.*, the Senator successfully introduced an amendment calling for "the continuation of collective bargaining rights." Senator Morse could not have been clearer about the purpose of his amendment:

> The question of policy is this: Should the Federal Government make available to cities, States and local governmental units Federal money to be used to strengthen their mass transit system . . . when the use of that money would result in lessening the collective bargaining rights of existing unions?
>
> . . . .
>
> . . . [I]t is my underlying thesis as I press for the adoption of the amendment: That is, we ought to maintain the status quo.
>
> . . . .
>
> *. . . If you have collective bargaining now, I think the bill ought to be so drawn that you will be assured of a continuance of collective bargaining, so far as the Federal Government is concerned.*

*Id.* at 5671-72 (emphasis supplied).

There can be little doubt as to the effect of the Morse amendment: by adopting it, Congress meant to *require* the continuation of collective bargaining rights, not merely to recommend such a continuation. Whatever discre-

tion the Secretary may have under section 13(c), it does not include the discretion to ignore the statute's requirements and certify a labor agreement that does not provide for the continuation of collective bargaining rights.

[3] The District Court reached its contrary conclusion because it believed that Congress did not intend to impose federal labor policy on the states. 582 F.Supp. at 530. However, this argument misconceives the operation of the statute. Under section 13(c), states remain free to adopt any constitutionally permissible public sector collective bargaining law they choose. Nothing in UMTA pre-empts this authority, nor do section 13(c) or the labor agreements created under it override state law. *See Jackson Transit Authority,* 457 U.S. at 27, 102 S.Ct. at 2209 (section 13(c) does not supersede state law); *Local Division 589, Amalgamated Transit Union v. Massachusetts,* 666 F.2d 618, 627 (1st Cir. 1981) ("Congress intended state law, not § 13(c) assurances, to prevail in case of a conflict"), *cert. denied,* 457 U.S. 1117, 102 S.Ct. 2928, 73 L.Ed.2d 1329 (1982). But as the Supreme Court recognized in *Jackson Transit Authority,* states have no automatic entitlement to federal funding for their transit systems, and must satisfy section 13(c) if they desire such assistance. The Court made it abundantly clear that labor protective agreements are to be the product of local laws and local bargaining, but that section 13(c) governs a state's right to federal funding.

> Congress intended that § 13(c) would be an important tool to protect the collective-bargaining rights of transit workers, *by ensuring that state law preserved*

*their rights before federal aid could be used to convert private companies into public entities.*

457 U.S. at 27-28, 102 S.Ct. at 2209 (emphasis supplied).[8]

[4] Section 13(c) does not prescribe mandatory labor standards for the states, but rather dictates the terms of federal mass transit assistance. States are free to forego such assistance and thus to adopt any collective bargaining scheme they desire; the mandatory language of section 13(c) in no way alters this prerogative. But the statute does not allow states to eliminate collective bargaining rights and still enjoy federal aid. Section 13(c) prevents such a result by prohibiting the Secretary from certifying labor agreements that do not provide for the continuation of collective bargaining rights.[9]

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8. The Court reiterated this theme throughout its opinion. At the outset, it noted that "a state or local government must make arrangements to preserve transit workers' existing collective-bargaining rights before that government may receive federal financial assistance." 457 U.S. at 16, 102 S.Ct. at 2203. Later, the Court stated that Congress included § 13(c) "[t]o prevent federal funds from being used to destroy the collective-bargaining rights of organized workers." *Id.* at 17, 102 S.Ct. at 2204. Elsewhere, the Court summarized Senate debate as "reflect[ing] a congressional intent that the Federal Government be able to seek changes in state law and ultimately to refuse financial assistance when state law prevented compliance with § 13(c)." *Id.* at 25 n. 8, 102 S.Ct. at 2208 n. 8. Finally, the Court discussed the effect of Senator Morse's amendment to § 13(c), which deleted the "encouragement" language, noting that "these alterations in the bill demonstrate only that Congress demanded that the Secretary ensure that state law preserved collective-bargaining rights before he provided federal aid for acquisition of a private transit company." *Id.* at 28 n. 10, 102 S.Ct. at 2209 n. 10.

9. This construction of the statute is consistent with the First Circuit's decision in *Local Division 589 v. Massachusetts*, 666 F.2d 618, upon which both the Secretary and District Court relied for their contrary interpretation. The question before the First Circuit was not whether § 13(c) sets out mandatory

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2. *Federally Defined Rights*

In order to decide whether Act 1506 prevents MARTA from satisfying the requirements of section 13(c), we must first determine what "the continuation of collective bargaining rights" requires. The Secretary argues that state law must be the guiding star for defining "collective bargaining rights." Adoption of a federal standard, he contends, would effectively require state and local governments to waive their exclusion from the NLRA, and would give federal labor policy primacy over state law, contrary to Congress' intent. The legislative history behind section 13(c), however, reveals that Congress did indeed adopt a federal standard for measuring the "continuation of collective bargaining rights" under UMTA.

As we noted earlier, Senator Morse was quite explicit about the purpose and effect of his amendment. By deleting the "encouragement" language from section 13(c), the amendment was designed to preserve the status quo such that, where workers enjoyed collective bargaining

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minima or hortatory suggestions, but rather whether § 13(c) agreements are binding on states and override contrary state law. In concluding that § 13(c) agreements do not supersede state law, the court noted that

> § 13(c) assurances need not override state law to make § 13(c) enforceable. The threat of receiving no further UMTA funds would often prevent a state currently receiving those funds from changing its laws contrary to the policy of 13(c). If not, the Secretary might halt the flow of funds or take other appropriate action.

*Id.* at 634. We decide today the question the First Circuit did not reach, and hold that where a state, through its laws or otherwise, fails to satsify the requirements of § 13(c), the Secretary must cut off funds by denying certification.

rights prior to a state's acquisition of a transit system with federal money, those workers were to be "assured of a continuance of collective bargaining." 109 Cong.Rec. 5672 (1963). Maintaining the status quo usually meant substantially preserving collective bargaining rights that had been established by federal labor policy. Senator Morse addressed this issue when he discussed the consequences of a state's decision to adopt labor laws not in conformity with federal labor policies.

> What we have in that situation . . . is a conflict between a sound Federal public policy and a policy of a State. The State can continue its State policy if it wishes to; but in [my] judgment . . . the State should not be allowed to receive Federal money with which to continue a policy that is in conflict with sound Federal policy.

*Id.* at 5672.

The bill's opponents also understood that principal points of federal labor policy often would govern a state's entitlement to federal funds under section 13(c). In both houses, members introduced amendments that would have required the continuation of collective bargaining rights only to the extent not inconsistent with state law. Congress rebuffed these efforts. *See* 109 Cong. Rec. 5422 (1963); *id.* at 5582, *id.* at 5684; 110 Cong.Rec. 14979-80 (1964). Passage of these amendments would have demonstrated Congress' willingness to permit state laws to provide the substantive meaning of "collective bargaining rights." Their defeat, however, "reflected a congressional intent that the Federal Government be able to seek changes in state law and ultimately to refuse financial assistance when state law prevented compliance with

§ 13(c)." *Jackson Transit Authority,* 457 U.S. at 25 n. 8, 102 S.Ct. at 2208 n. 8.

The legislative history, therefore, reveals Congress' clear intent to measure state labor laws against the standards of collective bargaining established by federal labor policy. The Secretary's contrary construction of section 13(c) would produce a meaningless tautology: if state law defines the "collective bargaining rights" that must be continued under the federal statute, then a public transit authority's labor relations always will be in compliance with section 13(c), because by definition a state transit authority will be in conformity with state law. Congress clearly did not envision section 13(c)(2) operating in such a fashion.

On the other hand, by passing section 13(c), Congress did not intend to subject local government employers to the precise strictures of the NLRA. The exclusion of local governments from the coverage of that Act, *see* 29 U.S.C. § 152(2) (1982), was to remain intact. During Senate debate on the Morse amendment, Senator Goldwater specifically asked if section 13(c) would be inconsistent with the NLRA exclusion. 109 Cong.Rec. 5674 (1963). Senator Morse assured him it would not. The language of the bill, Senator Morse stated, "make[s] it clear that the Taft-Hartley exemptions are not changed by the amendment." *Id.* In *Jackson Transit Authority,* the Supreme Court reviewed this legislative history and concluded that "[s]ection 13(c) evinces no congressional intent to upset the decision in the National Labor Relations Act to permit state law to govern the relationships between local governmental entities and the unions representing their employees." 457 U.S. at 23-24, 102 S.Ct. at 2207.

Thus, Congress neither imposed upon the states the precise definition of "collective bargaining" established by the NLRA and the case law that has developed under that Act, nor did it employ a term of art devoid of all meaning, leaving the states free to interpret and define it as they saw fit. Instead, Congress used the phrase generically, incorporating within the statute the commonly understood meaning of "collective bargaining." The 1964 Congress was not writing on a clean slate. Then as now, collective bargaining was universally understood to require, at a minimum, *good faith* negotiations, to a point of impasse, if necessary, over wages, hours and other terms and conditions of employment.

> [T]he duty to bargain in good faith is an "obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement. . . ." Not only must the employer have "an open mind and a sincere desire to reach an agreement" but "a sincere effort must be made to reach a common ground."

Cox, *The Duty to Bargain in Good Faith,* 71 HARV.L. REV. 1401, 1415 (1958) (quoting *NLRB v. Montgomery Ward & Co.,* 133 F.2d 676, 686 (9th Cir.1943)).

These precepts have long been the bedrock of collective bargaining in the federally-regulated private sector. *See* NLRA § 8(d), 29 U.S.C. § 158(d) (1982); *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965) (plurality opinion) (particular hours of day and days of week employees work are mandatory subjects of collective bargaining); *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 222, 85 S.Ct. 398, 409, 13 L.Ed.2d 233 (1964)

(Stewart, J., concurring) (amount of work, periods of relief, and safety practices are conditions and terms of employment); *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962) (violation of duty to bargain for employer to grant merit increases and change sick leave policy during contract negotiations with union before agreement or bargaining impasse has been reached); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958) (defining "mandatory" subjects of bargaining). Likewise, the foregoing principles have provided the common denominator of the public sector collective bargaining schemes enacted by the states. Indeed, approximately thirty states have adopted collective bargaining statutes covering some or all categories of public employees, and, while they vary in many respects, all provide for good faith bargaining over wages, hours and other terms and conditions of employment.[10]

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10. Alaska, Alaska Stat. § 23.40.250 (1984) (wages, hours and other terms and conditions of employment for all public employees except school teachers); California, Cal.Government Code §§ 3504, 3516, 3529 (West 1980) (wages, hours and other terms and conditions of employment for all public employees); Connecticut, Conn.Gen.Stat.Ann. §§ 5-271, 7-468, 10-153a (West 1977 & Supp.1985) (wages, hours and other conditions for state employees, municipal employees and teachers); Delaware, Del.Code Ann. tit. 2, § 1613 (1975), tit. 14, § 4002 (Supp. 1984), tit. 19, § 1301 (1979) (wages, salaries, hours, and other terms and conditions of employment for transportation workers, school teachers and public employees); Florida, Fla.Stat.Ann. § 447.309 (West 1981) (wages, hours, and terms and conditions of employment for all public employees); Hawaii, Hawaii Rev.Stat. § 89-3 (1976) (wages, hours and other terms and conditions of employment for all public employees); Idaho, Idaho Code § 44-1802 (1977) (wages, rates of pay, working conditions and all other terms and conditions of employ-

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ment for firefighters); Illinois, Ill.Ann.Stat. ch. 48, §§ 1603, 1606, 1607, 1710 (Smith & Hurd Supp. 1985) (wages, hours and other conditions of employment for all public employees and school teachers); Iowa, Iowa Code Ann. § 20.9 (West 1978) (wages, hours, vacations, insurance, holidays, leaves of absence, shift differentials, overtime, supplemental pay, seniority, transfers, job classifications, health and safety matters, evaluation procedures, in-service training procedures and staff reductions for all public employees); Kansas, Kan.Stat.Ann. § 75-4322 (1984) (salaries, wages, hours, vacations, sick leave, holidays, retirement and insurance benefits, overtime, shift differentials and grievances for all public employees, except school teachers); Maine, Me.Rev.Stat.Ann. tit. 26, §§ 965, 979-D, 1026, 1285 (1974 & Supp.1984-85) (wages, hours, working conditions and contract grievance arbitration for municipal, county, state, university and judicial employees); Massachusetts, Mass.Gen.Laws Ann. ch. 150E, § 6 (West 1982) (wages, hours, standards of productivity and performance, and any other terms and conditions of employment for state, county and municipal employees); Michigan, Mich.Comp.Laws §§ 423.211, 423.215 (1978) (wages, hours and other terms and conditions of employment for all public employees except classified state employees); Minnesota, Minn.Stat.Ann. §§ 179A.05-179A.07 (West Supp.1985) (terms and conditions of employment for all public employees); Montana, Mont. Code Ann. § 39-31-305 (1983) (wages, hours, fringe benefits, and other conditions of employment for all public employees); Nebraska, Neb.Rev.Stat. § 48-837 (1984) (terms and conditions of employment for all public employees except municipal employees); Nevada, Nev.Rev.Stat. § 288.033 (1983) (wages, hours and other terms and conditions of employment for local government employees, teachers and state nurses); New Hampshire, N.H. Rev.Stat.Ann. § 273-A:1 (1978) (wages, hours and other conditions of employment for all public employees); New Jersey, N.J. Stat.Ann. § 34:13A-5.3 (West Supp.1984) (terms and conditions of employment for all public employees); New York, N.Y. Civil Service Law §§ 201, 203 (McKinney 1983) (salaries, wages, hours and other terms and conditions for most public employees); North Dakota, N.D. Cent.Code § 15-38.1-09 (1981) (salary, hours and other terms and conditions of employment for teachers); Ohio, Ohio Rev.Code Ann. § 4117.03 (Page Supp.1984) (wages, hours, terms and other conditions of employment for all state employees except

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In sum, Congress struck a delicate balance in section 13(c). The statute provides that state law should govern the labor relations of public transit authorities and their employees, but it conditions federal transit aid, in part, on the continuation of collective bargaining rights. In setting out those rights, Congress chose not to incorporate the entire structure and requirements of the NLRA into section 13(c), for to do so would force the states to choose between federal transit aid and their exclusion from the

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members of organized militia); Oklahoma, Okla.Stat.Ann. tit. 11, § 51-102 (1978) (wages, hours and other conditions of employment for firefighters and police); Oregon, Or.Rev.Stat. § 243.650 (1983) (direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment); Pennsylvania, 43 Pa.Cons.Stat. § 1101.-701 (Supp.1985) (wages, hours and other terms and conditions of employment for all public employees); Rhode Island, R.I. Gen.Laws §§ 28-9.1-4, .2-4, .3-2, .4-3 (1979 & Supp.1984), § 36-11-1 (1984) (hours, salary, working conditions and all other terms and conditions of employment for state and municipal employees, teachers, firefighters and police); South Dakota, S.D. Codified Laws Ann. § 3-18-2 (1980) (grievance procedures and conditions of employment for all public employees); Vermont, Vt.Stat.Ann. tit. 3, § 904, (Supp.1984) (wages, hours, working conditions, overtime, leave, reduction-in-force procedures, grievance procedures, insurance and personnel regulations for state employees), tit. 16, § 2004 (1982) (salary, economic conditions, and grievance procedures for teachers), tit. 21, § 1725 (1978) (wages, hours and conditions of employment for municipal employees); Washington, Wash. Rev.Code Ann. §§ 41.56.030, 41.59.020 (Supp.1985) (wages, hours and working conditions for public employees and teachers); and Wisconsin, Wis.Stat.Ann. §§ 111.70, 111.91 (West Supp.1984) (wages, hours and conditions of employment for state and municipal employees). *See also* Advisory Commission on Intergovernmental Relations. Labor-Management Policies for State and Local Governments 102-03 (1969) (state statutes should set out management rights, but "[w]ages, hours and other terms and conditions of employment . . . [should be] left for the conference table.").

coverage of the NLRA. On the other hand, Congress made it clear that federal labor policy would dictate the substantive meaning of collective bargaining for purposes of section 13(c). "Good faith" bargaining, to a point of impasse if necessary, over wages, hours and other terms and conditions of employment has always been the essence of federally-defined collective bargaining rights; indeed, excluding the federal sector, it is the almost universally recognized definition of collective bargaining in the United States.

[5] Section 13(c)'s requirement, therefore, that labor protective agreements provide for "the continuation of collective bargaining rights" means, at a minimum, that where employees enjoyed collective bargaining rights prior to public acquisition of the transit system, they are entitled to be represented in meaningful, "good faith" negotiations with their employer over wages, hours and other terms and conditions of employment. Collective bargaining does not exist if an employer retains the power to establish wages, hours and other conditions of employment without the consent of the union or without at least first bargaining in good faith to impasse over disputed mandatory subjects. It is against this standard that we must measure Act 1506 and MARTA's labor protective agreement.

3. *Act 1506 and Collective Bargaining*

When the Georgia legislature passed Act 1506 in 1982, the new law altered in several material respects the existing statutory authorization of MARTA to engage in collective bargaining. First, Act 1506 provided that collective bargaining could not impair "the inherent man-

agement rights of the Authority," including but not limited to,

> (1) the right to assign employees, respecting rights of seniority;
>
> (2) the right to discharge employees for just cause;
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> (3) the right to subcontract service, other than for the operation of rail or bus vehicles, provided no employees are laid off;
>
> (4) the right to hire part-time employees, for no more than 25 hours per week, without payment of fringe payments; and
>
> (5) the right to establish the number of regular hours that may be worked in a week, not to exceed 40 hours, and to fix the number of overtime hours, not to exceed 10 hours per week.

Act 1506 § 3(b)(2)(A)-(B), (E)-(G), 1982 Ga. Laws at 5105. The effect of these statutory provisions was to remove the foregoing subjects from the scope of bargaining.

Second, the 1982 Georgia law also changed the procedures for the referral of bargaining disputes to interest arbitration. Act 1506 now requires that, before bargaining disputes may be resolved in binding interest arbitration, they must first be submitted to a neutral fact-finder "to explore the issues and render a report to the Authority, the authorized representative concerned, and the public." The fact-finder's report "shall recommend appropriate wages, hours and working conditions," but it is not binding on the parties. Act 1506 § 3(b)(5), 1982 Ga. Laws at 5106-07.

Third, the 1982 statute significantly amended the preexisting law by providing that issues concerning wages may not be submitted to binding interest arbitration ex-

cept upon the consent of both parties. Act 1506 § 3(b)(2), 1982 Ga.Laws at 5104. Thus, unless the employer agrees to accept the fact-finder's recommendations or consents to interest arbitration, MARTA retains the power to fix wages. Indeed, although Act 1506 requires bargaining over wages for at least 60 days after expiration of a labor agreement, *id.*, it does not specify that negotiations must be conducted in "good faith" to a point of impasse. However, it is our interpretation that section 13(c) does so require. If it were otherwise, 15 days following the issuance of the fact-finder's report, MARTA could fix wages as it saw fit, *id.*,[11] without any preceding requirements of "good faith" negiotiations or a bargaining impasse.

It is obvious that several of these provisions are completely antithetical to the concept of collective bargaining embodied in section 13(c). Fringe benefits clearly fall within the compass of "wages," and are therefore subjects over which employers and employees must bargain.[12]

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11. The statute provides that parties must engage in bargaining for 60 days after the expiration of a contract. Act 1506 § 3(b)(2), 1982 Ga.Laws at 5104. It then provides for fact-finding with respect to unresolved issues, presumably including wages. *Id.* § 3(b)(2) and (5), 1982 Ga.Laws at 5104. 5106-07. Since wages are excluded from binding arbitration unless both parties consent, it is clear that MARTA may act unilaterally with regard to wages following fact-finding.

12. *See*, e.g., *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed. 2d 230 (1962) (accumulation of sick leave is mandatory subject); *Richfield Oil Corp. v. NLRB*, 231 F.2d 717 (D.C.Cir.) (stock purchase plan can be mandatory subject), *cert. denied*, 351 U.S. 909, 76 S.Ct. 695, 100 L.Ed. 1444 (1956); *NLRB v. Black-Clawson Co.*, 210 F.2d 523 (6th Cir.1954) (profit sharing

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Act 1506, however, bars MARTA from negotiating over these benefits with respect to part-time employees, and thereby prevents the continuation of collective bargaining over wages that section 13(c) mandates. Similarly, the number of regular hours and the amount of overtime an employee can work are universally recognized as mandatory subjects of collective bargaining.[13] Yet Act 1506 forecloses negotiations on these subjects and permits MARTA to establish work hours and overtime by management fiat.[14] In addition, Act 1506 gives MARTA uni-

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plans are "wages"); *W.W. Cross & Co. v. NLRB*, 174 F.2d 875 (1st Cir.1949) (group health insurance classified as "wages"); *Singer Mfg. Co. v. NLRB*, 119 F.2d 131 (7th Cir.) (paid holidays and vacations mandatory subjects), *cert. denied*, 313 U.S. 595, 61 S.Ct. 1119, 85 L.Ed. 1549 (1941); *Detroit Police Officers Ass'n v. City of Detroit*, 391 Mich. 44, 214 N.W.2d 803 (1974) (pensions are mandatory subject); *see* also discussion of cases contained in Labor Relations Law in the Public Sector, Ch. 4, *The Obligation and Duty to Bargain* (H. Edwards, T. Clark & C. Craver 2d ed. 1979 & 3rd ed. forthcoming 1985).

13. *See Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965) (particular hours of day and days of week employees required to work within the realm of "hours"); *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525, 529 n. 4 (9th Cir. 1968) (work hours and work days are mandatory subjects); *see also supra* note 10 (of the thirty state statutory collective bargaining systems, all but five expressly include "hours" as a mandatory subject).

14. In the area of public education, some state courts have held that the length of the school day and school calendar is a matter of educational policy and is therefore not a mandatory subject. *See, e.g., City of Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 387 (Me.1973); *Burlington County College Faculty Ass'n v. Board of Trustees*, 64 N.J. 10, 311 A.2d 733 (1973); *West Hartford Education Ass'n v. DeCourcy*, 162 Conn.

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lateral control over promotions and work assignments. While several states have passed statutes that include such subjects within the scope of nonnegotiable management rights,[15] work assignments and promotions have generally been recognized as terms and conditions of employment over which workers and employees must collectively bargain.[16] Thus, Act 1506's reservation of this right to MARTA's exclusive control may be considered as possi-

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566, 295 A.2d 526 (1972). *See also* Me.Rev.Stat. tit. 26, § 965 (1)(c) (1975) (codifying result of *City of Biddeford* and excluding "educational policies" from scope of mandatory negotiations). Other states have held that the length of the school year is a mandatory subject. *See Joint School District No. 8 v. Wisconsin Employment Relations Board*, 37 Wis.2d 483, 155 N.W.2d 78 (1967); see also cases discussed in Labor Relations Law in the Public Sector, ch. 4, *supra* note 12.

15. *See* Hawaii Rev.Stat. § 89-9(d)(1) & (2) (Supp.1984); Kan.Stat.Ann. § 75-4326 (1984); Minn. Stat.Ann. § 179A.07 (West Supp.1985); Nev.Rev.Stat. § 288.150(3) (1983); N.H.Rev.Stat. Ann. § 273-A:1 (1978); Ohio Rev.Code Ann. § 4117.08 (Page Supp.1984).

16. *See, e.g., Fibreboard Paper Products*, 379 U.S. at 222, 85 S.Ct. at 409 (Stewart, J., concurring) (amount of work expected during hours is condition of employment); *Charmer Indus.*, 250 N.L.R.B. 293 (1980) (work assignment is mandatory subject), *enforcement denied on other grounds*, 664 F.2d 318 (2d Cir.1981), *cert. denied*, 456 U.S. 973, 102 S.Ct. 2236, 72 L.Ed.2d 847 (1982); *Beacon Piece Dyeing & Finishing Co.*, 121 N.L.R.B. 953 (1958) (workload is mandatory subject); *United States v. Gypsum Co.*, 94 N.L.R.B. 112 (1951) (recognizing seniority, promotions, and transfers as mandatory subjects), *modified*, 206 F.2d 410 (5th Cir.1953), *cert. denied*, 347 U.S. 912, 74 S.Ct. 475, 98 L.Ed. 1068 (1954); *Fire Fighters Union, Local 1186 v. City of Vallejo*, 12 Cal.3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974) (vacancies and promotions are mandatory subjects); *Los Angeles County Employees Ass'n, Local 660 v. County of Los Angeles*, 33 Cal.App.3d 1, 108 Cal.Rptr. 625 (1973) (caseload of welfare eligibility workers is mandatory subject).

bly inconsistent with the continuation of collective bargaining rights required by section 13(c).

[6] Act 1506 also bars MARTA from bargaining over subcontracting decisions. In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964), the Supreme Court made clear that, in the private sector at least, such decisions are mandatory subjects of collective bargaining. Many state courts and boards have followed the Court's lead, and have held that where subcontracting affects bargaining unit employees, it is a subject over which labor and management must bargain.[17] This practice, however, is not without exceptions, and several state courts and boards have concluded that decisions concerning subcontracting are matters of managerial prerogative, and are not negotiable despite their impact on employees.[18] We need not decide whether subcontracting is a mandatory subject of collective bargaining for purposes of section 13(c), however, in order to decide this case. Act 1506 prevents collective bargaining over fringe benefits, hours, overtime, work assignments and promotions, and therefore does not provide for the continuation of meaningful bargaining over wages, hours and other conditions of employment that section 13(c)

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17. *See, e.g., Unified School Dist. 1 v. WERC*, 81 Wis.2d 89, 259 N.W.2d 724 (1977); see also cases discussed in Labor Relations Law in the Public Sector, ch. 4, *supra* note 12.

18. *See, e.g., Local 195, IFPTE v. State of New Jersey*, 176 N.J. Super. 85, 422 A.2d 424 (1980), *aff'd in relevant part*, 88 N.J. 393, 443 A.2d 187 (1982); see also cases discussed in Labor Relations Law in the Public Sector, ch. 4, *supra* note 12.

requires.[19] Since Act 1506 prevents compliance with an express provision of section 13(c), the Secretary's certification of MARTA's labor protective agreement was improper.

[7] In so ruling, we wish to make clear that section 13(c)'s requirement that collective bargaining rights be continued does not in any way dictate the substantive provisions of a collective bargaining agreement. The District Court, in upholding the Secretary's certification, stated that it "would be contorting the legislative history to declare that the collective bargaining agreements must have exactly the same, or effectively the same provisions they had over 11 years ago." 582 F.Supp. at 531. We do not understand ATU to argue for such a result, however, nor do we adopt such a construction of the statute. Section 13(c) does not perpetuate the *substantive* terms of pre-acquisition bargaining agreements, but rather protects the *process* of collective bargaining. The substantive provisions of collective bargaining agreements may change, but section 13(c) requires that the changes be brought about through collective bargaining, not by state fiat.

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19. MARTA asserts that the right to discharge employees for cause is not inconsistent with either the collective bargaining statutes typically employed in the public sector, or the scope of collective bargaining in the federally-regulated private sector. Since Act 1506, as we read it, in no way precludes ATU from negotiating over a discharge in any individual case, or from bargaining over the meaning of "just cause," or from arbitrating grievance disputes concerning employee dismissals, we can find no material inconsistency between Act 1506 and the continuation of collective bargaining on the point of discharges for cause. *See National Licorice Co. v. NLRB*, 309 U.S. 350, 360, 60 S.Ct. 569, 575, 84 L.Ed. 799 (1940) (employer's negotiations with individual employees rather than union over meaning of just cause violated employees' right to baragin collectively).

4. *Interest Arbitration and Collective Bargaining*

ATU advances an additional ground for invalidating the Secretary's certification: because Georgia law prohibits strikes by public employees, and because Act 1506 provides for binding arbitration over wage disputes only if MARTA consents, MARTA may unilaterally set wages. Thus, ATU argues, Act 1506 further deprieves bargaining unit employees of the continuance of collective bargaining rights by giving them no real voice on a subject that is universally acknowledged to lie at the heart of collective bargaining.

In the private sector collective bargaining is thought to work because each side has economic weapons at its disposal—in the case of a union, that weapon is the right to strike. While Congress made it clear that section 13(c) would not protect the right of unionized workers to strike, *see, e.g.*, 109 Cong.Rec. 5672 (1963), ATU contends that loss of this weapon must be recompensed with some compulsory mechanism for resolving bargaining disputes over wages. Otherwise, it is claimed, the employer will have unfettered power to set wages unilaterally, which is the antithesis of collective bargaining.

In response, the Secretary argues that the adversarial character of collective bargaining in the private sector is not an immutable law of nature, but rather a creature of the NLRA. *See NLRB v. Insurance Agents International Union*, 361 U.S. 477, 489, 80 S.Ct. 419, 427, 4 L.Ed.2d 454 (1960) (present system of economic weapons is part and parcel of system created by Wagner and Taft-Hartley Acts). Congress was aware that public asquisition of transit companies would result in the loss of

transit workers' rights to strike, but it neither prevented that loss nor required the substitution of interest arbitration in its stead. *See Local Division 1285, Amalgamated Transit Union v. Jackson Transit Authority*, 650 F.2d 1379, 1392 (6th Cir. 1981) ("Section 13(c) does not require protection of interest arbitration"), *rev'd on other grounds*, 457 U.S. 15, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982); *Local Division No. 714, Amalgamated Transit Union v. Greater Portland Transit District*, 589 F.2d 1, 6-7 (1st Cir. 1978) (statute does not command that interest arbitration be provided), *overruled in part on other grounds, Local Division 589, Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618 (1st Cir.1981), *cert. denied*, 457 U.S. 1117, 102 S.Ct. 2928, 73 L.Ed.2d 1329 (1982). Thus, in the private sector, Congress provided for the use of economic weapons, but it made no such provision in the public sector, nor did it condition certification on the presence of interest arbitration.

[8] The Secretary's argument, however, proves too much. While it is true that Congress neither protected the right to strike nor required interest arbitration as a condition of federal transit aid, it is inconceivable that a system that allows an employer to set wages unilaterally is consistent with the continuation of collective bargaining rights required by section 13(c). We hold that while section 13(c) does not entitle transit workers to any particular form of binding arbitration, it does require some process that avoids unilateral control by an employer over mandatory subjects of collective bargaining.

Unfortunately, the application of these principles in the instant case is anything but clear. First, although

Act 1506 mandates that the parties bargain "in the same manner and to the same extent as if [the Authority's employees] were the employees of any privately owned transportation system," much of the rest of Act 1506 is inconsistent with collective bargaining in the private sector. The general statutory mandate, standing alone, would seem to require "good faith" negotiations to a point of impasse; however, in light of the several statutory exclusions from the scope of bargaining, one cannot be sure whether the Georgia law even requires "good faith" bargaining over those matters that are subject to negotiations. The statute appears silent on the question and we have been referred to no state judicial decisions indicating an enforceable duty to bargain. Thus, ATU's claim that MARTA retains what amounts to unfettered control over wages has some force.

Second, ATU contends that "[i]t is not . . . the absence of interest arbitration which is the fatal impediment to certification. It is, rather, the absence of *any* mechanism to replace unilateral employer power which requires setting aside the Secretary of Labor's certification." Appellant's Reply Brief at 11-12 (emphasis in original). The problem with this argument is that it ends up being circular, leading to no apparent conclusion. ATU concedes that binding interest arbitration is not compelled by UMTA, and yet, so far as we can tell, the Union can point to no alternative to strikes other than binding interest arbitration.

Third, our reading of Act 1506 suggests that any unresolved issues over wages *must* be submitted to fact-finding. However, ATU asserts that fact-finding "is part of the wholly *voluntary* interest arbitration process and is

thus available only if MARTA consents." *Id.* at 944 n. 7 (emphasis in original). If ATU is correct, then it would appear that MARTA retains full power to set wages as it sees fit, especially if there is no requirement of "good faith" bargaining to a point of impasse. However, if *meaningful* fact-finding is a mandatory process to aid in the resolution of wage disputes, then there may indeed be a legitimate alternative to unilateral employer power. Unfortunately, on the record before us, we have no way of knowing either whether wage issues must be submitted to fact-finding or, if so, whether the fact-finding process is a fair and equitable mechanism for the resolution of bargaining disputes.

Under UMTA, Congress has made it clear that the right to strike is not to be preserved pursuant to federal law and that binding interest arbitration will not be required. Yet, Congress has mandated the continuation of collective bargaining. In these circumstances, we reject the Union's implicit suggestion that fact-finding in any form is inadequate if neither side is bound to abide by the fact-finder's conclusions. It simply does not follow that, under the curious scheme of UMTA, there can be no meaningful bargaining without the potential of a forced agreement pursuant to some neutral authority. Indeed, quite apart from the limitations inherent in UMTA, it is very difficult to know what, if anything, is an effective substitute for the right to strike. In many bargaining situations, a threat of strike may be meaningless, depending upon the economics involved, the staying power of the parties, the essentiality of the employees' work, public support for the parties, and the availability of alternative sources of labor or production. Given this reality, ATU is off-the-mark in

contending that nonbinding fact-finding *always* will be an inadequate substitute for the right to strike.

If the fact-finding process is mandated in such a way as to ensure a full and fair airing of the parties' issues, and to ensure fully informed and fair recommendations for settlement, an employer may be hard-pressed to reject the fact-finder's proposed judgment. The net result of this process could be a settlement that is more equitable than one that might be reached pursuant to a threat or exercise of a right to strike. In short, we believe that mandatory fact-finding with recommendations, preceded by "good faith" bargaining to a point of impasse, conceivably may be a legitimate mechanism to replace unilateral employer power to fix wages.

As of October, 1984, approximately thirty-five states had authorized some form of fact-finding, at the request of either party, for the resolution of bargaining disputes. *See Dispute Settlement in the Public Sector: The State-of-the-Art, Report to Department of Labor, Division of Public Employment Relations Services* 8-15 (T. Gilroy & A. Sinicropi eds. 1971) *reprinted and updated in Labor Relations Law in the Public Sector* (H. Edwards, T. Clark & C. Craver 2d ed. 1979 & 3rd ed. forthcoming 1985). These systems, of course, vary among, and often within the states, and we express no view concerning the extent to which they satisfy the requirements of section 13(c). They simply illustrate mechanisms for dispute resolution. Any system that the Georgia legislature may ultimately choose to adopt, however, will of course be measured against the standards of section 13(c), and must provide for significant consideration of the positions of *both* sides in a bar-

gaining dispute, thereby preventing unilateral employer control over mandatory subjects of collective bargaining.

Lastly, we note that ATU has contended that prior to the Secretary's decision in the present case, in instances where employees have lost the right to strike, the Secretary of Labor always has required that there be some final and binding means through neutral procedures for the resolution of disputes over new contract terms. According to ATU, the unexplained failure to adhere to this administrative practice is, without more, a compelling reason to set aside the Secretary's certification decision. *Motor Vehicle Manufacturers' Association v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (unexplained change in administrative interpretation cannot be sustained as valid agency action). The appellee responds that there is no concrete evidence of any "administrative practice" and, even if there is such evidence, the Secretary's action in this case was a legitimate exercise of discretion.

We find the record on this last point to be a muddle. It is not clear that any "administrative practice" has ever existed as a binding agency policy; however, if one has existed, the Secretary plainly failed to adequately explain his departure from the practice in this case.

In light of the foregoing observations, we are constrained to leave the issue of wage bargaining for possible future consideration by the Secretary of Labor. In the event that Act 1506 is amended to cure the scope of bargaining problems that we have identified, and the Secretary is again presented with a wage bargaining scheme similar to the one now embodied in the state law, he will

be required to make the following determinations precedent to any decision on a 13(c) certification for MARTA:

(1) Does Act 1506, or any other Georgia law, require "good faith" negotiations (as heretofore defined) over wages, to a point of impasse if necessary? If not, then it will be clear that there has been no continuation of collective bargaining as required by section 13(c).

(2) Are unresolved wage proposals subject to *mandatory* fact-finding (*i.e.* fact-finding at the request of either party)? If not, then it will appear that MARTA retains virtually unfettered control over wages, which would be inconsistent with the mandate of section 13(c).

(3) If wages are subject to mandatory fact-finding, has the fact-finding process been established so as to allow for a full and fair airing of bargaining disputes and equitable recommendations for settlement from a neutral fact-finder? Also, is MARTA under some obligation to seriously consider the fact-finder's recommendations; if so, is this done in the full eye of public scrutiny; and, must the employer explain or justify any failure to comply with the fact-finder's recommendations? All of these factors may affect a judgment as to the efficacy of the fact-finding process as an adjunct to meaningful collective bargaining.

(4) Has there been a practice followed by the Secretary of requiring some final and binding means through neutral procedures for the resolution of disputes over new contract terms? If so, the Secretary should explain any decision to deviate from the practice.

If the state of Georgia elects to remove the obstacles to collective bargaining, *e.g.*, with respect to assignments, benefits for part-timers, hours of work and overtime, and if the existing or a similar scheme for the resolution of wage disputes is maintained, then the questions posed

above must be addressed by the Secretary. However, if the state elects not to expand the scope of bargaining to allow for the continuation of collective bargaining then certification must be denied and the issue concerning wage bargaining will be moot.

## CONCLUSION

For the foregoing reasons, we conclude that the Secretary is not free to certify an agreement that does not provide for the continuation of collective bargaining rights. Act 1506 prevents the continuation of such rights by removing several mandatory subjects from the scope of collective bargaining and by arguably conferring upon MARTA unilateral control over wages. As a result, MARTA's labor protective agreement with ATU is inadequate when measured against the express requirements of section 13(c), and the Secretary's certification of that agreement as fair and equitable was therefore improper. The Georgia legislature is of course free to continue its current policies with respect to MARTA's transit workers, but it may not underwrite those policies with federal funds. We therefore reverse and remand this case, with instructions that the District Court require the Secretary to revoke the certification of MARTA's labor protective agreement.

*So Ordered.*

GINSBURG, Circuit Judge, concurring.

Congress' apparent purpose in enacting section 13(c) was provisional—to cushion the impact on transit employees of a change from private to public sector employ-

ment. It may be that, as years pass from the time of public takeover, it becomes more appropriate to align municipal transit workers with other municipal employees rather than with persons who labor in the private sector. *Cf. Local Division 589, Amalgamated Transit Union v. Massachusetts,* 666 F.2d 618, 634 (1st Cir.1981), *cert. denied,* 457 U.S. 1117, 102 S.Ct. 2928, 73 L.Ed.2d 1329 (1982). In that light, a collective bargaining scheme that would have been characterized "unfair" or "inequitable" in 1972 might appear just and adequate in 1990. But Congress did not provide for sunsetting section 13(c) and said nothing in the text of the provision to suggest that the essential process entailed in "the continuation of collective bargaining rights" should come to mean less as time goes by. I therefore concur in the court's compellingly reasoned decision.

MacKINNON, Senior Circuit Judge.

I concur in the foregoing opinion. To my mind the Georgia statute eliminates from the collective bargaining process just too many issues that have become generally recognized as basic and traditional "collective bargaining" issues. Collective bargaining is not a precise term and is open to some reasonable definition, but whether expressly defined or not, it implicitly includes a "good faith" requirement. However, collective bargaining does not necessarily require *binding* arbitration to ensure that bargaining will be carried out in good faith.

## APPENDIX B

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

September Term, 1984

Civil Action No. 82-02042

NO. 84-5159

Amalgamated Transit Union International, AFL-CIO, et al.,

Appellants

v.

Raymond J. Donovan, Secretary of Labor

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: EDWARDS and GINSBURG, Circuit Judges, and MacKINNON, Senior Circuit Judge.

JUDGMENT

(Filed July 9, 1985)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby reversed and this case is remanded with instructions, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court
/s/ George A. Fisher
Clerk

Date: July 9, 1985

Opinion for the Court filed by Circuit Judge Edwards.

Concurring statements filed by Circuit Judge Ginsburg and Senior Circuit Judge MacKinnon.

## APPENDIX C

AMALGAMATED TRANSIT UNION INTERNATIONAL, AFL-CIO, et al.,

Appellants

v.

Raymond J. DONOVAN,
Secretary of Labor.

No. 84-5159.

United States Court of Appeals,
District of Columbia Circuit.

Sept. 24, 1985

On Motion for Leave to Intervene.

F. Joseph Warin, Washington, D.C., was on the motion of Metropolitan Atlanta Rapid Transit Authority for leave to intervene.

Before EDWARDS and GINSBURG, Circuit Judges, and MacKINNON, Senior Circuit Judge.

Opinion for the Court PER CURIAM.

PER CURIAM:

The Metropolitan Atlanta Rapid Transit Authority ("MARTA") moves for leave to intervene in this case. This motion comes to us more than four months after this court heard oral argument and almost two months after we reversed the judgment of the court below. Because MARTA's request does not present an exceptional case involving imperative reasons justifying intervention at this late stage, we deny the motion to intervene.

The Secretary of Labor refused to deny certification to MARTA under section 13(c) of the Urban Mass Trans-

portation Act of 1964, 49 U.S.C. app. § 1609(c) (1982).[1] The District Court, 582 F.Supp. 522, upheld the Secretary of Labor's decision and the Amalgamated Transit Union ("ATU") appealed to this court. After oral argument on April 11, 1985, this court issued an opinion on July 9, 1985, reversing the District Court judgment. We remanded the case with instructions that the District Court require the Secretary to revoke the certification of MARTA's labor protective agreement. MARTA filed this belated motion for leave to intervene—as well as a Petition for Rehearing and Suggestion for Rehearing *En Banc*—on August 27, 1985.[2] MARTA seeks intervention in order to file its motion for rehearing *en banc* and to secure a right to petition for a writ of certiorari from the Supreme Court.

[1] A court of appeals may allow intervention at the appellate stage where none was sought in the district court "only in an exceptional case for imperative reasons." *Landreth Timber Co. v. Landreth*, 731 F.2d 1348, 1353 (9th Cir.1984), *rev'd on other grounds*, — U.S. —, 105 S.Ct. 2297, 85 L.Ed.2d 692 (1985); *Spring Construction Co. v. Harris*, 614 F.2d 374, 377 n. 1 (4th Cir.1980); *In re Grand Jury Investigation*, 587 F.2d. 598, 601 (3d Cir. 1978); *McKenna v. Pan American Petroleum Corp.*, 303 F.2d 778,

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1. The full facts of the Amalgamated Transit Union's challenge to the Secretary's refusal to deny certification to MARTA are laid out in our decision in this case. *Amalgamated Transit Union International, AFL-CIO v. Donovan*, 767 F.2d 939 (D.C. Cir.1985).

2. On August 26, 1985, the Secretary filed a Motion for Rehearing and Suggestion for Rehearing *En Banc*.

779 (5th Cir. 1962).[3] Where, as here, the motion for leave to intervene comes *after* the court of appeals has decided a case, it is clear that intervention should be even more disfavored. We further note that, if this were a proceeding to review agency action, the motion to intervene would have exceeded by far the limited time prescribed for such motions. Under Federal Rules of Appellate Procedure Rule 15(d), a motion for leave to intervene "shall be filed within 30 days of the date on which the petition for review is filed."

The obvious reason for the rule against belated intervention is that it is unduly disruptive and places an unfair burden on the parties to the appeal. After a case has been fully litigated, the positions of all interested parties have been fixed and fully addressed by the trial and appellate courts. It would be entirely unfair, and an inexcusable waste of judicial resources, to allow a potential intervenor to lay in wait until after the parties and the trial and appellate courts have incurred the full burden of litigation before deciding whether to participate in the judicial proceedings. Furthermore, if intervention is allowed after appellate argument and decision, both the judicial panel and the parties before the court are denied any meaningful op-

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3. No provision in the Federal Rules of Appellate Procedure provides for intervention on appeal, except in proceedings to review agency action. Fed.R.App.P. 15(d). Federal Rules of Civil Procedure Rule 24, relied upon by MARTA, only applies to intervention at the district court level. *See* Fed.R.Civ.P. 1; *International Union, UAW, Local 283 v. Scofield*, 382 U.S. 205, 217 n. 10, 86 S.Ct. 373, 381 n. 10, 15 L.Ed.2d 272 (1965). Although the Supreme Court has recognized that "the policies underlying intervention may be applicable in appellate courts," *id.*, courts of appeals have developed their own standards of intervention in order to take account of the unique problems caused by intervention at the appellate stage.

portunity to respond to any new arguments raised by a claimant who seeks to intervene.[4]

MARTA does not cite—and this court has been unable to find—any case in which intervention was permitted at this late stage.[5] It is arguable that a rare case offering truly imperative reasons for intervention may merit an exception, but as a general rule this court will deny motions to intervene at this late stage.

[2] There is no doubt that in this case there are no exceptional circumstances supported by imperative reasons to justify MARTA's motion for leave to intervene. MARTA argues that the Secretary of Labor is not an adequate representative of its interest because the Secretary is concerned with maintaining the scope of his authority and discretion over administrative matters in general, while MARTA's interest is focused on its entitlement to receive federal funds. This argument borders on being

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4. MARTA argues that no such disruption would occur here because MARTA's arguments have been reflected in briefs filed by the American Public Transit Association as amicus curiae. It also argues that no delay will result frim its petition for rehearing because the Secretary of Labor has already made a similar request. These arguments directly contradict MARTA's claim that its position is not now adequately represented.

5. Indeed, the few courts to face motions to intervene after an appellate court has issued a decision uniformly have rejected intervention as untimely. *See Alleghany Corp. v. Kirby*, 344 F.2d 571 (2d Cir.1965) (denying motion to intervene in shareholder derivative suit after court of appeals decision), *cert. dismissed as improvidently granted*, 384 U.S. 28, 86 S.Ct. 1250, 16 L.Ed.2d 335 (1966); *Walpert v. Bart*, 44 F.R.D. 359 (D.Md.1968) (denying motion to intervene in shareholder derivative suit for sole purpose of petitioning the Supreme Court for a writ of certiorari).

frivolous because the Secretary had to prevail in this case in order for MARTA to preserve its claim to federal monies.[6] This fact also serves to highlight the point that the real party in interest in this case is the Secretary and not MARTA. This case involved statutory limits on the Secretary's discretion in the certification of labor protective agreements. MARTA's conduct is not on trial and it can suffer no damages for any alleged past acts of misconduct. It can easily avoid the future loss of federal monies by compliance with federal law. If MARTA wishes to challenge the *future* exercise of the Secretary's discretion, it may do so by bringing an action against the Secretary, not by intervening in this case.

Furthermore, the alleged conflict of interest between the Secretary's focus on his general scope of authority and the employer's entitlement to funds is hardly exceptional. Such a conflict will exist in *any* appeal to which an agency is a party and a third-party faces some liability or loss of funds if the agency does not prevail.

Most importantly, MARTA offers no explanation whatsoever for its failure to make a request for intervention at the District Court level or even soon after ATU appealed to this court. Because the alleged conflict of interest between MARTA and the Secretary existed at the commencement of this litigation, the reasons now urged for intervention would have been equally applicable at much earlier stages of this case. Indeed, MARTA could have moved to intervene when ATU appealed, and then

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6. MARTA does *not* claim that the legal representation afforded the Secretary was somehow inadequate either at the District Court or in this court.

concurred in the government's position before this court. Alternatively, MARTA could have sought intervenor status while adhering to the arguments advanced in the amicus brief filed by the American Public Transit Association, a trade association to which MARTA belongs.

For the foregoing reasons, we conclude that intervention is not merited at this late stage. We therefore deny MARTA's motion for leave to intervene.

*So Ordered.*

**APPENDIX D**

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

September Term, 1984

No. 84-5159
CA No. 82-02042

Amalgamated Transit Union International, AFL-CIO, et al.

v.

Raymond J. Donovan, Secretary of Labor

BEFORE: Edwards and Ginsburg, Circuit Judges; and MacKinnon, Senior Circuit Judge

ORDER

(Filed Sep. 11, 1985)

Upon consideration of the motion of the Metropolitan Atlanta Rapid Transit Authority for leave to intervene, filed August 23, 1985, it is

ORDERED, by the Court, that the aforesaid motion is denied.

An opinion by the Court will issue at a later date.

*Per Curiam*
FOR THE COURT
GEORGE A. FISHER, CLERK

BY: Robert A. Bonner
Chief Deputy Clerk

Senior Circuit Judge MacKinnon did not participate in this order.

## APPENDIX E

AMALGAMATED TRANSIT UNION
AFL-CIO, et al., Plaintiffs,

v.

Raymond J. DONOVAN, Secretary of Labor, Defendant.

Civ. A. No. 82-2042.

United States District Court,
District of Columbia.

Feb. 24, 1984.

Michael H. Gottesman, Bredhoff & Kaiser, Washington, D.C., for plaintiffs.

Raymond J. Donovan, Secretary of Labor, Robert C. Seldon, Asst. U.S. Atty., Washington, D.C., for defendant.

### MEMORANDUM OPINION

THOMAS F. HOGAN, District Judge.

Under the Urban Mass Transportation Act, 49 U.S.C. § 1601, *et seq.* ("the Act" or "UMTA"), the Secretary of Labor ("Secretary") must determine whether the terms of collective bargaining agreements entered between Unions and their transit companies meet the labor-protective requirements of the Act before he can disburse federal funds to that transit company. In this case,[1] Local Division

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1. The Court has a related case, *ATU v. Donovan*, C.A. 82-2922. See 554 F.Supp. 589 (D.D.C. 1982). The parties have stipulated that C.A. 82-2042 shall be resolved first.

732, an unincorporated labor organization and local division of the Amalgamated Transit Union ("ATU" or "Local 732"), AFL-CIO, with its headquarters in Atlanta, Georgia, seeks, *inter alia*, a declaratory judgment that the Secretary has unlawfully certified federal funds to the Metropolitan Atlanta Rapid Transit Authority ("MARTA"). The genesis of this litigation was Georgia's enactment in March, 1982 of a statute ("Act 1506") which plaintiff alleges has prohibited MARTA from continuing certain important collective bargaining rights of its employees. Plaintiff contends that in light of this state legislalation the Secretary's disbursement of funds contravenes the requirements of the Act and must be enjoined. Defendants assert that the Secretary has acted lawfully since his decision to certify was within the discretion afforded him under the Act.

This matter is now before the Court on cross-motions for summary judgment. In addition to the well-written briefs and helpful and lively oral argument, the Court has had the benefit of an *amicus curiae* brief submitted by the American Public Transit Association ("APTA"), of which MARTA is a member. For the following reasons, the Court now grants defendant's motion for summary judgment.

## I. INTRODUCTION

Because it is necessary to view the parties' positions against the backdrop of almost two decades of labor-management relations in Atlanta, the Court will briefly review those relations before and after passage of UMTA and discuss how the MARTA amendments have altered sub-

jects that had been part of those agreements. In 1965, the George [sic ]state legislature created a public body corporate to be known as the Metropolitan Atlanta Rapid Transit Authority as a joint instrumentality of the City of Atlanta and the Counties of Fulton, Cobb, DeKalb, Clayton and Gwinett. *See* MARTA Act of 1965, Ga.Laws, 1965, p. 2243 *et seq.*, § 4 (Ex. 2 to Plaintiff's Motion for Summary Judgment ("Pl. Ex." 2)). After the MARTA Act was passed, MARTA acquired all of the common stock of the Atlanta Transit System (ATS), a privately owned company which had previously provided public transportation in Atlanta.

In 1971, MARTA applied to the United States government for a capital improvement grant under UMTA. Pursuant to the procedure outlined in UMTA, the collective bargaining agreement entered between MARTA and its employees was submitted to the Secretary of Labor for his review. The Secretary reviews these collective bargaining agreements to ensure that they satisfy criteria set forth at 49 U.S.C. § 1609(c).[2] That Section provides,

> It shall be a condition of any assistance under [section 1602 of this Title] that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing col-

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2. The Secretary of Labor has delegated his authority under Section 13(c) of UMTA to the Assistant Secretary of Labor-Management Relations. The Assistant Secretary has promulgated guidelines at 29 C.F.R. Part 215 regarding his activities in certifying arrangements made for satisfying Section 13(c) of UMTA.

> lective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2) of [this Title]. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

The agreements which result from bargaining between the transit companies and transit employees and which provide for such protections are commonly referred to as Section 13(c) agreements. On August 9, 1971, MARTA and the Union entered an agreement that contained a Section 13(c) agreement. This 1971 agreement was made part of all subsequent UMTA grants to MARTA until 1977.

The pertinent portions of the 1971 Section 13(c) agreement, upon which this litigation is centered, provided that with respect to collective bargaining in general,

> MARTA agrees that it will bargain collectively with the Union or otherwise arrange for the continuation of collective bargaining, and that it will enter into agreements with the Union or arrange for such agreements to be entered into, relative to all subjects of collective bargaining which are or may be proper subjects of collective bargaining with a private employer.

Exhibit 3 to Plaintiff's Motion for Summary Judgment, page 2. The agreement further provided,

> In the case of any labor dispute . . . such dispute or controversy may be submitted at the written request of either party hereto to a board of arbitration as hereinafter provided . . . . The decision by majority vote of the arbitration board shall be final, binding and conclusive. . . .

*Id.* at pp. 4-5.

Pursuant to that section, the board of arbitration consisted of three representatives: one chosen by MARTA and one by the Union who in turn would jointly choose a third and neutral representative. The agreement stated that "the term 'labor dispute' . . . shall be broadly construed and shall include . . . the making and maintaining of collective bargaining agreements, [and] the terms to be included in such agreements."[3] *Id.* at p. 7.

On February 14, 1977, MARTA entered a new § 13(c) agreement with the Union. The 1977 § 13(c) agreement was incorporated into all subsequent UMTA grants to MARTA since 1977. The 1977 Section 13(c) agreement provided essentially the same protections as were contained in the 1971 Section 13(c) agreement. (Affidavit of Earle W. Putnam ("Putnam Aff"), ¶ 11, attached to Plaintiff's Motion for Summary Judgment). The 1977 Section 13(c) agreement explicitly substituted mandatory binding (interest) arbitration upon impasse over the terms of new collective bargaining agreements. (*Id.* and ¶ 20 to Exhibit.)

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3. The parties engage in one of several forms of "interest" arbitration, as opposed to "grievance" arbitration, when they negotiate those terms that are to be included in a future collective bargaining agreement.

On March 16, 1982, the Department of Labor received an UMTA application for operating assistance from MARTA (Affidavit of Hugh Reilly). On March 25, 1982, the Department of Labor referred a copy of the application to ATU and notified MARTA regarding the referral. (Reilly Aff., ¶ 5.) By letter dated March 30, 1982 and received approximately one month later, ATU International President John Rowland stated that ATU would not object if the Department of Labor certified the 1982 application of MARTA on the basis of the terms and conditions stated in the February 14, 1977 Section 13(c) agreement. (Reilly Aff. ¶ 6.) On April 9, 1982, the General Assembly of the State of Georgia enrolled H.B. No. 55, the MARTA Act. That Act was approved by the Governor on April 20, 1982 as Act 1506, 1982 Ga.Laws, p. 5101, *et seq.*, and amends the MARTA Act of 1965. The 1982 Act forbids MARTA from bargaining over five subjects: the assignment of employees, discharge and termination of employees for cause, subcontracting of work, fringe benefits for part-time employees, and assignment and calculation of overtime and forbids MARTA from submitting disputes respecting those five subjects to binding arbitration. (Pl. Ex. 7, p. 5-7.) Lastly, with respect to wages, the 1982 Act provides that there be binding arbitration only upon the consent of both parties. (*Id.* at p. 5.)

On or about April 20, 1982, MARTA rejected ATU's request to use the parties' 13(c) Agreement of February 14, 1977 as a basis for a new 13(c) agreement unless all references to interest arbitration were deleted. (Reilly Aff. ¶ 8.) The parties subsequently reconciled their positions and reduced their agreement on June 3, 1982 to

writing that was to be incorporated in the Department of Labor's certification letter of June 11, 1982. That agreement provided, in pertinent part,

> In pending litigation in both federal and state[4] court, MARTA and ATU are in disagreement as to the proper interpretation, application, enforcement and effectiveness of the impasse resolution provisions of the February 14, 1977, agreement, and particularly paragraph 20 thereof. However, the parties have agreed that the terms and conditions of the February 14, 1977 agreement should be applied to the above-referenced grant application with the understanding that any issues between them as to the proper interpretation, application, enforcement and effectiveness of the impasse resolution provisions shall be unaffected thereby, and that certification of the February 14, 1977, agreement shall be without prejudice to the position of either party with respect to these impasse provisions. Once litigation has been finally concluded, either party may approach the Department of Labor and request that the Department take further appropriate action in respect thereto.

Reilly Aff. ¶ 9.

By telegram dated June 15, 1982, and letters dated June 21, 1982 and June 22, 1982, ATU requested that the Secretary withdraw his 13(c) certification letter based on the June 11, 1982 decision of the Supreme Court in *Jackson Transit Authority v. Local Division 1285*, 457 U.S. 15, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982), and the en-

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4. A Georgia state court eventually held in *MARTA v. Local Division 732*, No. C-836211 (Sup.Ct., August 2, 1982) that MARTA's revocation on February 22, 1982 of its initial consent to arbitrate terms and conditions of a future collective bargaining agreement was valid since it occurred before the final arbitration award.

actment on April 20, 1982 of the MARTA Act. (Pl. Ex. 8A and 8B.) By letter dated June 24, 1982, the Department of Labor advised that it had reviewed the *Jackson* decision and the 1982 MARTA Act but would deny ATU's request to withdraw certification, finding that

> The Department of Labor is unaware of any facts or circumstances which would render the February 14, 1977 agreement no longer fair and equitable and finds no basis for withdrawal of the certification in question.

(Pl. Ex. 9.)

Plaintiff views those labor protective provisions contained in Section 13(c) agreements since 1971 as "fair and equitable" arrangements. Its view has understandably been supported by the Secretary's certification, during the course of over eleven years, that those provisions satisfy the requirements of UMTA so that federal funds may be awarded. Defendants maintain that the arrangements can be modified which may be less accommodating to the unions but nevertheless capable of satisfying the "fair and equitable" standards. Basically, plaintiffs ask this Court to find that the MARTA Act prevents the continuation of collective bargaining rights while defendants ask the Court to uphold the Secretary's determination that collective bargaining rights do continue, within the meaning of UMTA, despite the MARTA Act. Since the labor protective standard under UMTA is written in broad and philanthropic language, the parties, as well as the Court, have reviewed the legislative history of UMTA to determine whether Congress intended the Secretary to refer to federal labor-management policy or an individual state's labor history and legislative response in deciding what was "fair and equitable."

## II. PRIOR JUDICIAL TREATMENT OF THIS CONTROVERSY

The Supreme Court, other federal courts and several state courts[5] have analyzed the UMTA Act and have reviewed various Section 13(c) agreements. Although the Court considers the issue presented here to be one of first impression, the parties have argued that those other decisions are dispositive of this issue and even that language contained in those other opinions should guide this Court.

In *Jackson Transit Auth. v. Local Division 1285, supra,* the Supreme Court reversed five Circuit Courts of Appeal that had found an implied federal cause of action under Section 13(c). The five courts reasoned that because federal funds were conditioned on the Secretary's approval of 13(c) agreements, a union aggrieved by a transit company's failure to comply with a provision in its 13(c) agreement had a federal right of action. Based on its review of the legislative history of UMTA, the Court concluded that Congress did not intend, through Section 13(c), to create a body of federal law applicable to labor relations between local governmental entities and transit workers. *Id.* at 27, 102 S.Ct. at 2209. The Supreme Court thus held that state courts were the appropriate forum in which to resolve suits by a union against a transit company that required the interpretation of a collective bargaining agreement. *Id.* at 29, 102 S.Ct. at 2210. Thus, the Court concluded that absent an independent source of subject-matter jurisdiction, such as diversity or pendent jurisdiction, a

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5. *See e.g.* fn. 4, *supra.*

District Court lacks jurisdiction to hear a union's suit against a transit company for breach of a 13(c) agreement.

At the District Court level, plaintiffs in *Jackson* had brought a mandamus claim against the Secretaries of Labor and Transportation to enforce the 13(c) mandatory interest arbitration provision. The District Court held that it had no subject-matter jurisdicion to hear the mandamus claim. The Sixth Circuit Court of Appeals reversed and held that the District Court had subject-matter jurisdiction (at least to determine whether a cause of action existed) but remanded for it to enter a judgment dismissing the mandamus claim for failure to state a claim upon which relief could be granted. *Local Division 1285 v. Jackson Transit Auth.*, 650 F.2d 1379, 1387-88 (6th Cir.1981). Because the dismissal of the Secretaries was not appealed, the Supreme Court did not have to address the issue of whether a federal district court would have jurisdiction over a union's suit against federal officials to enforce a provision in a 13(c) agreement. But it did comment that, strictly speaking, the District Court had jurisdiction under 28 U.S.C. § 1331 to hear the union's suit. *Jackson*, 457 U.S. at 21 n. 6, 102 S.Ct. at 2206[6] Plaintiffs urge that, based on *Jackson*, the Supreme Court would authorize the remedy they seek in this Court. The plaintiffs cite *Jackson* as support for the result they urge here. While the Supreme Court in *Jackson* did mention the Secretary's duty under UMTA, its opinion did not dictate, or

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6. The Court will address the reviewability issue in Section IIIA, *supra*.

even suggest any precise standard governing Secretarial actions.

In *Local Division 589 v. Massachusetts*, 666 F.2d 618, (1st Cir.1981) *cert. denied*, 457 U.S. 1329, 102 S.Ct. 2928, 73 L.Ed.2d 1329 (1982), the First Circuit Court of Appeals was called upon to review the legislative history of UMTA. In that case, plaintiffs challenged the constitutionality of a Massachusetts statute which altered the terms of a collective bargaining agreement so that it conflicted with a § 13(c) agreement. The Court crystallized the issue as

> whether Congress intended § 13(c), or to be more specific, whether it intended assurances made pursuant to § 13(c) to override conflicting State law. If not, State law governs—although the federal statutory scheme may provide other remedies for violation of an assurance.

*Id.* at 627. The Court reasoned that Congress intended State law, not § 13(c) assurances, to prevail in case of a conflict. *Id.* It therefore concluded that "specific detailed assurances given by a union and a transit authority to the Labor Department under (UMTA) § 13(c) do not invalidate a State law to the contrary." *Id.* at 636.

Plaintiffs do not find the Massachusetts case, as it has been dubbed, to be dispositive of the issue presented here. They do not quarrel with the premise that a State can amend its laws concerning collective bargaining to conflict with Section 13(c) assurances. Rather, they urge that if the State law goes too far, the Secretary will breach his duty under UMTA by awarding federal funds. According to ATU,

> The law [Act 1506] so skews arbitration of the remaining subjects in favor of management as to render arbitration useless as a means of preserving employee rights and interests. This grant recipient's willingness and capacity to agree to interest arbitration was, under 13(c), the condition of the receipt of the federal grant transferring the employees of the grant recipient out of private employment and depriving them of the federal guarantee of the right to strike. Georgia has now legislated MARTA out of its ability thus to agree to bargain and to arbitrate.

June 21, 1982 letter from John Rowland, International President, ATU, to Assistant Secretary of Labor Donald L. Dotson, Pl.Ex. 8.

For the reasons stated *infra*, the Court declines to declare that the Secretary acted arbitrarily and capriously under UMTA by finding that Act 1506 did not require that he withhold federal funds from MARTA.

## III. ANALYSIS

### 1. *Reviewability*

The Court finds the Secretary's action to be reviewable. It thus rejects defendant's contention that the Secretary's duty is "so committed to his discretion" that there is no law to apply. *See* 5 U.S.C. § 701(a)(2). This Circuit has recognized that the existence of agency discretion in itself "hardly constitutes grounds for concluding that agency action is unreviewable." *Local 1219, American Federation of Government Employees v. Donovan*, 683 F.2d 511 (D.C.Cir.1982).

That proposition would therefore hardly be persuasive against the strong presumption that generally agency

actions are subject to judicial review. *Natural Resources Defense Council, Inc. v.* SEC, 606 F.2d 1031, 1043 (D.C.Cir. 1979). Defendants have not met their burden of demonstrating that "a fair appraisal of the legislative scheme, including a weighing of practical and policy implications of reviewability persuasively [indicates] that judicial review should be circumscribed," *Local 2855, American Federal of Government Employees v. United States,* 602 F.2d 574, 578 (3rd Cir.1979); *accord, International Ladies' Garment Workers Union, et al. v. Donovan,* 722 F.2d 795 (D.C.Cir.1983); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-41, 87 S.Ct. 1507, 1510-11, 18 L.Ed.2d 681 (1967). For these reasons, the Court will review whether the Secretary of Labor has breached the duty imposed on him by UMTA.

As an aid to defining the scope of this Court's review, the parties have directed the Court's attention to the Supreme Court's decision in *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Insurance Co.,* — U.S. —, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). In that case, the Supreme Court reviewed the Secretary of Transportation's decision to rescind a previous requirement that vehicles manufactured be equipped with passive restraints. In *State Farm,* the Supreme Court found that a court would not use the same standard to review an agency's revocation of one of its rules as it would an agency's refusal to promulgate a rule in the first place. 103 S.Ct. at 2866. The Court reasoned that an agency that had reversed its position had a greater burden of explaining its change than one that did not act in the first place. *Citing Atchison T. & S. F. R. Co. v. Wichita Bd. of Trade,* 412 U.S. 800,

807-08, 93 S.Ct. 2367, 2375, 37 L.Ed.2d 350 (1973), the Court explained that

> a settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.

*Id.* 103 S.Ct. at 2866. The Supreme Court concluded that the 'agency had failed to support its decision to charge its course with a reasoned analysis and therefore declared the action arbitrary and capricious.

Plaintiffs urge the Court to approach this case as the Supreme Court did in *State Farm*. They contend that the Secretary's consistent certification of 13(c) agreements that provide for submitting labor disputes to binding interest arbitration demonstrates his determination that those labor protective provisions best meet UMTA's mandate. The Court has considered exactly how much weight it should give the prior practice. Based on its review of the legislative history, which will be explained *infra*, the Court does not agree with the plaintiffs that prior practice necessarily establishes the only valid interpretation of the requirements of the Act. As this Circuit explained in *Bldg. & Constr. Trades Dept., AFL-CIO v. Donovan*, 712 F.2d 611, 619 (D.C.Cir.1983),

> Prior administrative practice carries much less weight when reviewing an action taken in the area of discretion, when little more than a clear statement is required, than when reviewing an action in the field of interpretation where it is thought that the agency's contemporaneous and consistent interpretation of one

> of its enabling statutes is reliable evidence of what Congress intended.

*Id.* at 619.

[1] The Secretary's concern in certifying is not solely that certain, specific labor protective provisions are present in collective bargaining agreements. His duty is to scrutinize the agreement as a whole to ensure that it is fair and reasonable. His duty is couched in such broad terms because he must review collective bargaining agreements from states with varying collective bargaining laws to ensure that each is fair and equitable, taking into account various data. While *Local Div. 589, supra,* is not on all fours with this case, the Court agrees with the First Circuit's analysis of the congressional intent in enacting UMTA. That court explained,

> Congress's general intent to secure fair arrangements does not require the implementation of any *particular* set of detailed provisions. Indeed, if the specific detailed provisions of a § 13(c) assurance prevail over *any* conflicting change in State law, the Secretary of Labor would lose any ongoing power to exercise discretion—to decide whether or not a change makes the State system as a whole unfair to the transit workers. This result would be anomalous given a legislative history stressing the need for flexibility and discretion . . . If (a State changes its laws contrary to the policy of § 13(c)), the Secretary might halt the flow of funds or take other appropriate action. In any event, such an enforcement scheme is more consistent with congressional intent than the alternative urged upon us by the Transit Union: namely that § 13(c) permanently binds States to the details of § 13(c) assurances and referenced collective bargaining agreements entered into perhaps a decade earlier, regardless of whether changes in State law are, in any overall sense, unfair.

*Id.* at 634-35 (citations omitted) (emphasis in original).

The inquiry thus boils down to whether the Secretary abused his discretion by finding that the collective bargaining agreement, as affected by the MARTA Act of 1982, was a fair and equitable one and provided for the continuation of collective bargaining rights. With respect to the last requirement, the Court must analyze the philanthropic phrase, "the continuation of collective bargaining rights." Since these words by themselves do not provide clear guidance, the Court will discuss what the legislative history intended with respect to "continuation" and "collective bargaining rights." The Court must decide what type of collective bargaining rights Congress wanted the Secretary to ensure were continued. Secondly, the Court must decide whether federal or State law defines those collective bargaining rights.

[2] The specific dispute before the Court involves five collective bargaining subjects. Plaintiffs contend that the MARTA Act precludes MARTA from bargaining about five subjects, over which MARTA employees bargained before they were publicly acquired. According to their interpretation of UMTA, the Secretary's duty is to ensure that there is a continuation of those collective bargaining rights that MARTA employees enjoyed prior to public acquisition of that company. Defendants maintain that what was to continue was the process of collective bargaining itself and not any particular provisions. Plaintiffs express their concern that if particular provisions are abandoned and a general, amorphous standard replaces it, collective bargaining may be made so difficult as to abridge that process completely. An example will clarify their practical concerns. Defendants emphasize that the agree-

ment ensures that collective bargaining will continue since amendments to the MARTA Act provide for the presentation of bargaining disputes to interest arbitration upon mutual consent only after several other courses are pursued. Plaintiff's fear that management's refusal to consent to submitting a dispute to binding interest arbitration will effectively result in imposing on the union's certain unfavorable terms.

A review of the legislative history of UMTA makes it clear that Congress never intended plaintiff's specific and constricted interpretation. Congress was concerned that the public takeover of private mass transit companies and the use of federal funds for labor saving automation would adversely affect transit workers. Congress intended that there be some protections for those groups of workers who would bear the direct effect of a change. Secretary of Labor Willard Wirtz testified concerning the clause in the first sentence of 13(c), "to protect the interests of employees affected by such assistance," that

> it is intended to cover those employees, present employees, whose interests would be adversely affected by a change, and it would not be intended to establish protections for the future as far as new employees are concerned.

*Hearings on S. 6 and S. 917 Before the Subcomm. on Housing of the Senate Comm. on Banking and Currency,* 88th Cong., 1st Sess. 317. Thus the phrase "continuation of collective bargaining rights" cannot be considered alone but must be read with reference to that group of people to whom those protections were directed. In conclusion, the reference point is workers affected by transitions, e.g., either by merger, acquisition or automation. Additionally,

as the Court has explained *supra*, "continuation" cannot be read to bind either transit unions or their employers to those particular provisions in place when there was a transition from private to public employment.[7] Such an interpretation would result in an inflexible and unworkable scheme.

Secondly, plaintiffs urge that in interpreting which "collective bargaining rights" must be afforded, the Secretary should have used and this Court must use as a reference point federal rather than State labor law and policy. Alternatively, they argue that if State law was to be the reference point, this does not evince Congress' intent that the Secretary would be willing to accept ever-changing state or local laws to define the federal standard. This argument contradicts several congressional concerns expressed in UMTA's legislative history. Congress recognized the local nature of the issue and was fully aware that states and localities would be changing their laws regarding collective bargaining. Precisely because mass transit operates on an intrastate basis, federal dictation of labor standards would be inappropriate. The Supreme Court recognized in *Jackson*,

> Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers.

457 U.S. at 27, 102 S.Ct. at 2209. And in *Local Div. 589*, the First Circuit explained,

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7. Parenthetically the Court notes that the agreement between Local Division 732 and ATS from June 21, 1969 to June 20, 1972 contained no provision for the arbitration of a new collective bargaining agreement but permitted either party to request grievance arbitration. See Ex. 2, *Amicus* brief in support of defendant.

> Whether or not such a federal presence is desirable, we cannot interpret the ambiguous language of § 13(c) to create it without a fairly clear indication that such was Congress's intent. Unlike railway and airline workers, we are here considering workers for *local* transit companies whose employers, by and large, are municipalities or state governments. Moreover, in the National Labor Relations Act Congress explicitly exempted public employees, such as MBTA workers, from federal labor legislation.

*Id.* at 633.

In testifying before the Senate, Secretary Wirtz stated

> To the extent that the State law prohibits both in letter and in practice any collective bargaining where municipal employees are concerned, the kind of thing that you have suggested, with that change, there would be the necessity of administrative action as to whether or not under those circumstances there could be fair and equitable protection of the employees' rights.

Senate hearings at 482.

In the Secretary's view, neither the Supreme Court's decision in *Jackson* nor the passage of the 1982 MARTA Act necessitated his determining that the § 13(c) agreement at issue was not fair and equitable, as plaintiffs had urged. The legislative history of UMTA evinces a concern that the policy of collective bargaining continue. In the Secretary's determination, the MARTA Act does not result in such an abridgement of that process that he was required to cut off federal funds. The Court would be contorting the legislative history to declare that the collective bargaining agreements must have exactly the same, or effecively the same provisions they had over 11 years ago. The far greater implication of such a ruling, however,

is that it would, in essence, dictate those terms that must be included in the particular collective bargaining agreement before it, be read to suggest appropriate terms to be included in other agreements and clearly substitute this Court's judgment for the agency's decision-making process. While the Court has found it appropriate to review the Secretary's decision, it does not find his decision to be arbitrary and capricious and therefore cannot overrule it.

An appropriate order and judgment shall issue.

## APPENDIX F

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

September Term 1984

Civil Action No. 82-02042
No. 84-5159

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Amalgamated Transit Union International, AFL-CIO,
Appellants

v.

Raymond J. Donovan, Secretary of Labor

BEFORE: Edwards and Ginsburg, Circuit Judges, and MacKinnon, Senior Circuit Judge

O R D E R

(Filed September 6, 1985)

Upon consideration of the petition for rehearing of appellee, it is

ORDERED, by the Court, that the petition is denied.

*Per Curiam*

For The Court
GEORGE A. FISHER, CLERK

By: /s/ Robert A. Bonner
Chief Deputy Clerk

## APPENDIX G

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

September Term, 1984

Civil Action No. 82-02042
No. 84-5159

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Amalgamated Transit Union International, AFL-CIO, et al.,

Appellants,

v.

Raymond J. Donovan, Secretary of Labor

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges, and MacKinnon, Senior Circuit Judge

ORDER

(Filed September 6, 1985)

The suggestion for rehearing *en banc* of appellee has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

*Per Curiam*

For The Court
GEORGE A. FISHER, CLERK

By: /s/ Robert A. Bonner
Chief Deputy Clerk

## APPENDIX H

§ 1609. Labor standards

*Interests of employees; protective arrangements; terms and conditions*

(c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

Pub.L. 88-365, § 13, formerly § 10, July 9, 1964, 78 Stat. 307, renumbered and amended Pub.L. 89-562, § 2(a)(1), (b)(2), Sept. 8, 1966, 80 Stat. 715, 716; Pub.L. 90-19, § 20(a), May 25, 1967, 81 Stat. 25.

## APPENDIX I

Rule 24. Intervention

*(a) Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.